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No. 3018

United States
1 1114
Circuit Court of Appeals

For the Ninth Circuit.

Apostles on Appeals.

(IN TWO VOLUMES.)

COMPAGNIE MARITIME FRANCAISE, a
French Corporation,

Appellant,

vs.

HERMANN L. E. MEYER, GEORGE H. C.
MEYER, HERMANN L. E. MEYER, JR.,
J. W. WILSON, and JOHN M. QUAILE,
Partners Under the Style of MEYER, WIL-
SON & COMPANY,

Appellees.

VOLUME II.
(Pages 257 to 504.)

Upon Appeals from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.

Filed

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(Testimony of Hiram Coalfleet Davison.)

Q. Would you expect sea of that character to so strain a vessel that she would leak as this vessel leaked if she was in a seaworthy condition when she started?

A. Well, we do not expect it, but they do sometimes; there may be something defective about the ship that we do not know until we get to sea and get this weather.

Q. Did you ever have heavy rolling in calm weather? A. Yes, very often.

Q. Is that unusual in certain parts of the globe?

A. No. After a heavy gale of wind, or perhaps we might not have the wind, it may be the sea from wind at a distance from us; if it is calm and the vessel is helpless she will get in what we call the trough of the sea and she will roll very heavily.

Recross-examination.

Mr. HENGSTLER.—Q. Captain, as a matter of fact, the weather on September 28th—not the weather on September 28th, but the condition of the sea with reference to its being rough and being a heavy swell, the condition of the sea might have been much rougher than the mere wind on the 28th of September might indicate, might it not?

A. Well, the fact of the wind shifting from one point to the other would make a worse sea than if it was blowing steadily from one point.

Q. And also it might have been that a very heavy wind swept [222] over that same neighborhood on the preceding day and might have passed away, and there might be no wind and still the sea be exceed-

(Testimony of Hiram Coalfleet Davison.)

ingly heavy, might it not?

A. Oh, yes, that is probable.

Further Redirect Examination.

Mr. CAMPBELL.—Q. Captain, if the ship was rolling heavily can you state whether or not you would expect an entry to that effect to be made in the log?

A. Well, yes, we always make an entry, or as a rule; sometimes a thing like that is neglected. Sometimes there are a great many things neglected in the log. That is for the mate to keep and we only overhaul it once a week.

Testimony of Edmund E. Manning, for Libelants.

EDMUND E. MANNING, called for the libelant, sworn.

Mr. CAMPBELL.—Q. You are a ship master, are you, Captain? A. I am.

Q. How long have you been going to sea?

A. 29 years.

Q. How long have you been a ship master?

A. 18 years.

Q. What character of vessels have you sailed in as master? A. Most all kinds.

Q. Are you at present the Master of a sailing vessel? A. I am.

Q. What one? A. The "William T. Lewis."

Q. What was she before she was renamed the "William T. Lewis"?

A. The "Robert Duncan."

Q. A British iron bark?

A. A British steel bark.

(Testimony of Edmund E. Manning.)

Q. A three-masted bark or a four-masted?

A. Four-masted.

Q. What tonnage?

A. 2,000 tons; 196 is the correct tonnage. [223]

Q. Do you mean 2,196 or 2,096?

A. I mean 1,996.

Q. What is her dead weight capacity?

A. 3,500 tons.

Q. In what waters have you sailed, Captain, as master? A. I have sailed all over the world.

Q. Have you ever been around Cape Horn?

A. Yes, sir.

Q. How many times do you suppose?

A. 22, I think.

Q. Have you ever gone around from the South Atlantic to the South Pacific, in the months of November and December? A. Yes, sir.

Q. What kind of weather do you expect to encounter off to the northwestward of the Falkland Islands, in the month of November?

A. We have all kinds of weather.

Q. What do you mean by all kinds of weather?

A. Some days you will have fine weather and other days you will have a gale of wind.

Q. Are you familiar with the Beaufort Scale?

A. Not very.

Q. You do not rate your different grades of weather by the Beaufort Scale?

A. No, I do not.

Q. Give us a little more graphic description of the kinds of weather you might expect; when you say

(Testimony of Edmund E. Manning.)

“bad weather” what do you mean by “bad weather,” what effect does it have on the ship?

A. You have to reduce your ship down; if it is blowing a gale of wind you reduce your ship down to it, with a heavy sea running.

Q. What effect does a heavy sea have on a vessel?

A. It makes her roll and tumble about.

Q. Does it ever make her roll so that she will roll her bulwarks under? A. Yes, sir.

Q. Is that an unusual or a common occurrence?

A. A common occurrence. [224]

Q. Would you expect that, if you were starting out from Rotterdam to San Francisco and passing the Horn in the month of December? A. Yes, sir.

Q. Would you expect to have any water on the vessel in that weather? A. Yes, sir.

Q. When you say that you would expect to reduce the ship, would that be an ordinary experience or extraordinary? A. Ordinary.

Q. What sails would you be carrying in a gale of wind?

A. I would be carrying the lower top-sails if she was blowing a gale of wind.

Q. I am going to read to you this weather which is described by the Master, reading from page 11:

“Q. How long did that go on?

A. Nothing happened particularly until the 22d of November.

Q. Where was the vessel on that day?

A. The vessel was about 49 degrees, 37 minutes South latitude, and 66 degrees, 37 minutes west longitude.”

(Testimony of Edmund E. Manning.)

I will ask you, Captain, have you those in mind?

A. Yes, sir.

Q. Whereabouts does that place you with respect to Cape Horn, the Falkland Islands and the River Platte?

A. Northward and westward of the Falkland Islands.

Q. Is that in the vicinity of the River Platte?

A. It is to the southward of the River Platte. The River Platte, I think, is in 38; from 35 to 38.

Q. "Q. On that date the weather was fine until 9 o'clock at night. The wind increased in force rapidly, and we had to take in all sails but the fore-sail, two lower top-sails and the lower stay-sails." [225] Was she at that time, Captain, under such shortened sail as indicated a heavy gale?

A. Not a very heavy gale, a moderate gale.

Q. "A. At 11 o'clock, the wind blew a storm, and the sea became heavier very rapidly. At twelve o'clock, in a gust we lost the topmast stay-sail and the mizzen stay-sail. In a while the sea became tremendous, and we lost the fore stay-sail. The ship not being stayed by the sails we had lost, she rolled terribly. The decks were full of water. The decks being full of water, and the ship rolling heavily, we could not get the exact soundings.

Q. Could you pump?

A. No, sir, we could not pump. I went myself in the pump-well, and I saw there was an increase of water."

(Testimony of Edmund E. Manning.)

Q. Captain, what do you mean by the "pump-well"?

A. The entrance where you go down to the pumps. There is a hatch there.

Q. It is like an ordinary well, but leads from the deck down to the bottom of the ship? A. Yes.

Q. So that you can get down into the bottom of the ship and see what the water is? A. Yes.

Q. "I went myself in the pump-well, and I saw there was an increase of water, but we could not pump because the bottom of the pipe at each rolling was dry, the vessel being on her side. Another survey was made at 4 o'clock in the afternoon, and we saw the same thing, the sea being still very heavy, and the wind shifting to the southwest, the ship in a cross sea. We wore the ship around at 8 o'clock. The sea was very high until the 25th of November at 8 o'clock A. M. On the 24th of November, coming around westerly at 2 o'clock P. M., we wore [226] the ship around to take a starboard tack. I ordered the pumps to be sounded by the carpenter when the ship was upright, and the carpenter reported that he found one meter and 25 centimeters in the hold, so that the water had increased rapidly since the morning. After the wearing of the ship, I set one watch to the pumps, and ordered an examination of the life-boats made to see that they were in order. At 6 o'clock, the wind freshened again, big seas coming from every part; the decks being always covered with water it was very difficult to work the pumps. At 6 o'clock, we found one meter and 55

(Testimony of Edmund E. Manning.)

centimeters in the hold. At 6 o'clock I called the crew aft and explained to them the situation, and we resolved to take refuge in the Falkland Islands for the saving both the cargo and the ship. At the same hour we kept her off, and made for the Islands.

Q. We do not need the further details until you get to the place where you beached the ship.

A. That is a few hours later. Both watches were relieving each other at the pumps every half hour, so they were working continually, and I saw that the water did not increase so much while the ship was running before the wind. The ship was steering very badly when we were close to Roy Cove. We entered the Cove at 4:30, and at 4:55 the ship was beached at 500 meters from the entrance of the Cove. At that time the sounding of the pump was two meters and 27 centimeters, the ship having a list of 6 degrees to starboard."

Now, Captain, I will ask you whether or not, in your judgment, the weather detailed and described by this log, or by the Master—I suppose it is an entry taken from the log—was [227] weather different from what you might expect on a voyage around Cape Horn from the South Atlantic to the South Pacific, in the month of November?

A. Yes, I think so. I have experienced the same kind of weather.

Q. That is the same kind of weather you would expect? A. Yes, sir.

Q. Have you ever made a voyage around Cape Horn without getting that kind of weather?

(Testimony of Edmund E. Manning.)

A. I do not think I have.

Q. Will you tell me whether or not a ship is more apt to strain herself when she is working under a head sea or running before the wind?

A. Working into a head sea she is more apt to strain herself.

Q. And if a ship was leaking when she was running into a head sea and was afterwards put about and put before the wind and the leaking was less, would that indicate to your mind the source of the leak at all?

Mr. HENGSTLER.—Ask him what it would indicate to his mind; don't suggest to him.

Mr. CAMPBELL.—I have not suggested anything to him; I am asking him whether it would indicate anything?

A. Will you ask the question again?

Q. I will strike that whole question out. If a ship had been leaking when she was sailing into a head sea and she was afterwards put before the wind, in the same sea, and the leaking was less, I ask you whether or not that would indicate to you anything as to the possible source of the leak or the possible cause of the leak? A. No, I do not think so.

Q. Supposing that you were master of a vessel and you found that your vessel was leaking so much water per hour, or per 24 hours, when you were working into a head sea, and you [228] afterwards put her before the same sea, and you found the leak is decreasing, she is not leaking as much, would that to you, as the master of the vessel indicate anything

(Testimony of Edmund E. Manning.)

as to the cause or as to the source of the leak?

A. Well, there are so many things that could cause it. Of course, the ship would be working more when she is going into a head sea; it would not tell me where it was or what it was on account of that.

Q. Now, bearing in mind that state of facts, Captain, I will add to that that afterwards she is docked and certain of her butts are found to be leaking; would the circumstance of her leaking less in running before the sea than when running into the sea indicate anything to your mind as to whether or not that leakage was leakage through the butts?

A. It might do that; she might not leak quite so much running into the sea; she would be strained more and working when going into a head sea; she would not leak as bad when she was running.

Q. That is, if the leakage came from what source?

A. Through her butts.

Q. Now, I am going to read to you from the log again, reading from page 34: "Q. On what date did you discover the leak?

A. The 28th of September.

Q. Up to that time there was no water at all in the well, as I understand?

A. A little water, but very little indeed.

Q. The ship was not making any water?

A. No, sir.

Q. Why didn't you keep any record at all of the soundings before that time in the log-book?

A. The log-book does not show any amount of water because there was none to report, [229] but

(Testimony of Edmund E. Manning.)

at the end of each watch, the officer has written down
“Pumps free.”

Q. On what day did you leave Brest?

A. 24th of September.

Q. The weather from the time you left Brest up to the 28th day of September, when the leak was sprung, was as fine weather as it was possible to have at sea, was it not?

A. The two or three first days. After that we had a breeze starting at the west, going to southwest, getting fresh, and shifting to the northwest.”

Is it ever customary, Captain, for a shipmaster to describe a gale of wind as a breeze?

A. No, I do not think so.

Q. “Q. But you had no stormy weather up to that time—up to the 28th?

A. I have not examined the log.

Q. Look at your log, and tell us whether the weather was not the ordinary weather that a sailing vessel encounters without any stormy weather.

A. During the nights of the 26th and 27th, we had bad weather.

Q. Describe the weather as it is given in the log.

A. From 8 o'clock to midnight of the 26th, we had bad weather.

Q. Is this entry in your log correct: ‘From midnight of the 26th to midnight of the 27th, weather squally; nice breeze; swell; all sails set.’ In the second watch, ‘Squally weather; nice breeze; all sails set.’ In the third watch ‘Squally weather; nice breeze; all sails set.’ In the fourth watch, ‘Squally

(Testimony of Edmund E. Manning.)

weather of little strength; a fine breeze; all sails set.' Next watch, 'Cloudy; fine breeze; a few squalls; all sails set.' The next day; 'From midnight of the 27th to midnight of the 28th.' In the first watch, 'Squally weather; strong rain; the wind blows to the southwest, and shifts to the northwest; gaff-top-sail and main-jib torn, royals and [230] upper topgallant sails and stay-sails and spanker taken in.' In the next watch: 'The same kind of weather; strong breeze; a large swell from the northwest; the topgallant-sails taken in; unbent the main-jib; violent squalls; strong winds; heavy sea; set the topgallant-sails and mizzen stay-sail.' Next watch, 'Cloudy weather and squally; strong breeze; heavy sea from the west, northwest; the same sail as during the preceding watch.' Next watch, 'Squally weather; strong breeze; furled the mainsail at 6 o'clock.' Next watch on the same day, 'The same weather; very strong swell; violent squalls.' The next day, 'Midnight of the 28th to midnight of the 29th.' In the first watch, 'Fine weather; some squalls; strong breeze becoming less at the end of the watch.' Second watch, 'Fine weather; fine breeze; set the mainsail; royal, spanker and stay-sail.' In the next watch, 'Fine weather; fine breeze; all sails set.' In the next watch, 'Squally weather; the sea falls more and more; all sails set; tested the steam gear; found an increase of water in the hold; sounded 23 centimeters; cleared the pumps.' In the next watch, 'Fine weather; the breeze softens; all sails set.' The

(Testimony of Edmund E. Manning.)

next watch, 'Fine weather; light breeze; all sails set.' "

Captain, how would you describe the weather encountered during those days?

Mr. HENGSTLER.—Just a moment; perhaps you had better read the entire description of that weather.

Mr. CAMPBELL.—All right, I will go on.

"And on that day, did you make any notation in your own handwriting on the log-book with reference to the discovery of water in the hold?

A. Yes, sir; I wrote at the foot of the log not to fail to sound at every watch, and to give [231] an account to the captain; if the water rises slowly and regularly, they must pump in the morning at 7:20 and in the evening at 4 o'clock.

Q. Does that log correctly state the facts as they occurred at the time with reference to the character of the weather? A. Yes, sir.

Q. During all of this time, or any part of this time, was your ship rolling? A. Yes, sir.

Q. Was that the natural roll of an ordinary ship in that kind of weather, or was it an extraordinary rolling?

A. The rolling was caused by this wind which started at the southwest, and shifted to the northwest, the sea having become very heavy by the cross seas, and when the wind shifted to the northwest, the wind decreased, and the vessel not being stayed by the sails rolled heavily.

Q. Is it not usual if a vessel rolls very heavily, that

(Testimony of Edmund E. Manning.)

is more than is expected of her, to make an entry in the log that the ship has been rolling?

A. Generally, but it was neglected.

Q. Was there a laboring of the ship prior to the leak starting, which was unexpected or unusual?

A. Yes, sir; the day after that night, the wind shifted from the southwest to the northwest.

Q. Was the laboring of the ship upon that occasion very extraordinary?

A. The ship labored less than she did later after that storm at the Falkland Islands, but she did labor very much.

Q. Is it not usual for any ship to labor more or less in a cross sea without making water?

A. Certainly, the "Duc d'Aumale" itself did it many times, probably, but this time she sprung a leak. [232]

Q. Then that must have come from some weakness of the ship before she started, did it not? There must have been some weakness?

A. I don't think so.

Q. How can you account for the ship springing a leak in weather which was fine, all excepting during one or two days at the most, and that weather not very bad, no storms?

A. I cannot give any other explanation.

Q. Then the only explanation that you have to give is that the ship strained in this kind of weather, and started a leak? That is the only explanation you can give? A. Yes, sir.

Q. After the leak was started, how long did the

(Testimony of Edmund E. Manning.)

good weather continue?

A. Variable weather, up to the storm that we had in the west of the Falkland Islands.

Q. About what date was that?

A. The 22d of November."

Mr. HENGSTLER.—May I make a suggestion here, if your Honor please: This is a description which the captain of the "Duc d'Aumale" gave on cross-examination; in order to get his picture of the situation completely it would probably be well to read also the description which he gave on direct examination; that will complete it and will give a more perfect picture of the weather and of its action.

Mr. CAMPBELL.—I agree with you, Mr. Hengstler; do you want to read it?

Mr. HENGSTLER.—You can read it. It is on page 10, I think.

Mr. CAMPBELL.—Yes, on page 10. I will read it.

"A. We left Brest on the 21st at 9 o'clock in the morning. There was a small breeze from the north, shifting from the north to west, and we sailed until the 26th of September, and [233] had fine weather and calm sea. We encountered westerly wind with a choppy sea.

Q. On what day?

A. The 26th of September. There was a swell until the 28th.

Q. What occurred on the 28th?

A. The wind hauled to the southwest, freshening and increased, the sea coming heavy rapidly. The

(Testimony of Edmund E. Manning.)

wind shifted to the northwest on the 28th at 2 o'clock in the morning. The weather cleared up, but the sea became very heavy. We had very violent squalls, especially during the watch from 8 o'clock in the morning until noon. The weather became cloudy again in the afternoon with squalls, the sea being very heavy, direction west, northwest. From 8 P. M. to midnight, the sea was still heavier, and the squalls more and more violent.

Q. Are you still on the 28th?

A. Yes, sir; on the 29th the weather became fine, and the squalls less and less violent, the wind decreasing rapidly, there being still a squall. There were times when the ship was rolling heavily, the sea coming from abeam. At 4 o'clock in the afternoon, we found an increase of water in the ship's hold. We found 23 centimeters at 4 o'clock. We pumped at once, and cleared the water from the hold in a quarter of an hour.

Q. What latitude and longitude was the vessel in on that day, the 29th?

A. 38 degrees, 28 minutes north latitude at noon; 17 degrees, 43 minutes west. The vessel was steering south 35 degrees west.

Q. Now, go ahead and tell what happened next.

A. We saw every day that water was increasing in the hole regularly, about one centimeter every hour.

Q. What did you do with the pumps during that time? [234]

A. We pumped regularly, morning and evening.

(Testimony of Edmund E. Manning.)

At 7:20 in the morning and 4:20 at night.

Q. For how long a time each night?

A. About 20 minutes each time.

Q. Did you succeed in controlling the inflow of the water by this pumping?

A. By pumping 40 minutes, we cleared the water from the hold.

Q. How long did that go on?

A. Nothing happened particularly until the 22d of November."

Now, Captain, bearing in mind those descriptions of the weather, I will ask you whether or not in your judgment, based upon your experience as a ship-master, that weather was any other than the usual weather expected to be encountered at sea?

A. No, I do not think it was.

Q. How would you characterize it?

A. Well, it was between fine weather and a moderate gale, with a heavy cross sea.

Q. I will ask you whether or not, in your judgment, the seas which would be caused by such wind as described here, and the weather described here, would be such seas as you would ordinarily expect to encounter at sea, or extraordinary?

A. Well, I think a little extraordinary; sometimes you have more sea than what the wind would think you would have, that is, from the amount of wind you have; you would have more sea.

Q. Is there any description here which would indicate to your mind whether or not the sea was any other than the kind of a sea you might expect at sea?

(Testimony of Edmund E. Manning.)

A. No, I do not think it is. We experienced that lots of times in cases like that.

Q. Is there anything in this entry in the log from which I read that indicates that the vessel was severely straining from that sea. [235]

Mr. HENGSTLER.—If your Honor please, I object to that, because the log itself answers that question.

Mr. CAMPBELL.—I will withdraw the question; it may be stricken out of the record.

Q. Will you state, Captain, whether or not you would expect to find an entry in the log to that effect if the ship was rolling very heavily?

A. Yes, I would expect it. I would expect my mate to put an entry in the log.

Q. Have you ever carried a cargo of pig iron and coke?

A. I have never carried any pig iron; I have carried coke.

Q. Captain, I wish you would take this chart. This is one of the Hyrdographic charts. I want you to mark on there, as nearly as you can, the position of this vessel on the 22d of November, to wit: 49 degrees, 37 minutes south, 66 degrees, 21 minutes west.

A. This is not exactly the place, but it is just about exactly where I have marked the cross.

Q. The cross marked with the capital "D" indicates approximately the latitude and longitude?

A. Yes, sir.

(Testimony of Edmund E. Manning.)

The COURT.—Now, Captain, where is that river you spoke of?

A. That is further south; that is between 35 and 38, I think, the mouth of the river.

Mr. CAMPBELL.—I will offer that chart in evidence. (The document was marked Libelant's Exhibit "C.")

Mr. Hengstler, have you any objection to my offering the pictures of this vessel for the purpose for which I have used them?

Mr. HENGSTLER.—You mean the photographs?

Mr. CAMPBELL.—Yes.

Mr. HENGSTLER.—No objection. [236]

(The photographs are marked Libelants' Exhibits "A" and "B," respectively.)

Cross-examination.

Mr. HENGSTLER.—Q. You have no knowledge with reference to the customs of French ships and what entries they make in their log-books?

A. None at all, sir; I know nothing about that.

Q. Captain, do you know the French bark "Duc d'Aumale"? A. No.

Q. You have never seen her?

A. I have never seen her.

Mr. CAMPBELL.—Q. Captain, you have seen the French types of vessels, have you?

A. Oh, yes, I have seen them very often.

Q. Do they differ materially in their rig from the English vessels? A. In some ways they do.

Q. In what ways?

(Testimony of Edmund E. Manning.)

A. They generally have more houses on the deck, less room space.

Mr. HENGSTLER.—Q. They have different lines from the English ships, generally speaking, do they not?

A. I do not think there is very much difference.

Q. There are different types of French vessels also, are there not?

A. They are not all built along the same lines.

Testimony of D. R. Fleming, for Libelants.

D. R. FLEMING, called for the libelants, sworn.

Mr. CAMPBELL.—Q. Captain, are you a ship-master? A. Yes, sir.

Q. How long have you been going to sea?

A. About 33 years.

Q. How long have you been a master?

A. 8 or 9 years. [237]

Q. Of what ship are you at present master?

A. The "Drummuir."

Q. What class of vessel is she?

A. A four-masted bark, 1,798 tons register.

Q. What is her dead weight capacity?

A. 2,800 tons.

Q. What kind of a vessel? A. Iron.

Q. Is she a British registered vessel?

A. Yes, sir.

Q. Have you ever been around Cape Horn?

A. Yes, sir.

Q. How many times, do you suppose?

A. I could not tell, not very many, about 8 or 9.

Q. Have you ever been around from the South

(Testimony of D. R. Fleming.)

Atlantic to the South Pacific, in the months of November and December?

A. I have, but it is so long ago that I almost forget it.

Q. What kind of weather did you find you encountered around Cape Horn?

A. You could get all kinds. The last time I went was not in November, and we had beautiful weather, but two days afterwards or 4 hours afterwards you might get a gale of wind.

Q. What kind of gales of wind may you expect down there? A. You get all kinds.

Q. What effect do such gales of wind have upon the sea? A. They raise her up in a big sea.

Q. What effect do the gales of wind that you may expect around Cape Horn have upon a vessel?

A. Well, it all depends upon the strength of the gale and of the vessel herself, and the condition of the vessel, the condition that she is in, and the draught of the vessel, the way she is loaded, and the trim of the vessel.

Q. I will get at it this way: State whether or not you may expect a vessel to take water on the deck.

[238] A. Oh, certainly.

Q. Is that an unusual or a usual occurrence?

A. It is very usual.

Q. Do you ever expect to have to shorten sail at all?

A. Oh, yes, certainly; we very seldom go around there without shortening sail.

Q. Have you ever gone around there without the

(Testimony of D. R. Fleming.)

vessel rolling or pitching at all?

A. Yes, but not in that month. My last time around there was this last year and it was fine weather. That was the summer time, and that is exceptional.

Q. Is it usual or unusual to encounter fine weather around Cape Horn? A. It is unusual.

Q. When you say you are going around Cape Horn, from where in the South Atlantic to where in the South Pacific do you include in rounding the Horn? A. What is that?

Q. Let me ask you the question this way, though it might be leading; what do you call "rounding the Horn"; from 55 to 55? A. Yes, exactly.

Q. Is the weather that you might expect to encounter to the northwestward of the Falkland Islands any different in character than that you may expect in rounding the Horn proper?

A. Well, I could not state that exactly. I have not been around there since so long ago that all I remember is having bad weather; I have not been around there for years except in the summer time.

Q. Now, Captain, I am going to read to you from this log. You have not been in court all the morning, have you?

A. I have been here a good while.

Q. I will read from page 11:

"Q. How long did that go on?

A. Nothing happened particularly [239] until the 22d of November.

Q. Where was the vessel on that day?

(Testimony of D. R. Fleming.)

A. The vessel was about 49 degrees, 37 minutes south latitude, and 66 degrees, 21 minutes west longitude. On that date the weather was fine until 9 o'clock at night. The wind increased in force rapidly and we had to take in all sails, but the foresail, the two lower top-sails and the lower stay-sails. At 11 o'clock, the wind blew a storm, and the sea became heavier very rapidly. At 12 o'clock, in a gust, we lost the topmast stay-sail and the mizzen stay-sail. In a while the sea became tremendous, and we lost the fore stay-sail. The ship not being stayed by the sails we had lost, she rolled terribly. The decks were full of water. The decks being full of water, and the ship rolling heavily, we could not get the exact soundings.

Q. Could you pump?

A. No, sir, we could not pump. I went myself in the pump-well, and I saw there was an increase of water, but we could not pump because the bottom of the pipe at each rolling was dry, the vessel being on her side. Another survey was made at 4 o'clock in the afternoon, and we saw the same thing, the sea being still very heavy, and the wind shifting to the southwest, the ship in a cross sea. We wore the ship around at 8 o'clock. The sea was very high until the 25th of November at 8 o'clock A. M. On the 24th of November, coming around westerly at 2 o'clock P. M. we wore the ship around to take a starboard tack. I ordered the pumps to be sounded by the carpenter when the ship was upright, and the carpenter reported that he found one meter and 25 centimeters in

(Testimony of D. R. Fleming.)

the hold, so that the water had increased rapidly since the morning. After the wearing of [240] the ship, I set one watch to the pumps, and ordered an examination of the life-boats to see that they were in order. At 6 o'clock, the wind freshened again, big seas coming from every part; the decks being always covered with water, it was very difficult to work the pumps. At 6 o'clock, we found one meter, and 55 centimeters in the hold. At 6 o'clock I called the crew aft and explained to them the situation, and we resolved to take refuge in the Falkland Islands for the saving both the cargo and the ship. At the same hour we kept her off, and made for the Islands.

Q. We do not need the further details until you get to the place where you beached the ship.

A. That is a few hours later. Both watches were relieving each other at the pumps every half hour, so they were working continually; and I saw that the water did not increase so much while the ship was running before the wind. The ship was steering very badly when we were close to Roy Cove. We entered the Cove at 4:30, and at 4:35, the ship was beached at 500 meters from the entrance of the Cove. At that time the sounding of the pump was two meters and 27 centimeters, the ship having a list of 6 degrees to starboard."

Captain, what is your judgment as to the character of the weather described there?

Mr. HENGSTLER.—I object to the question upon the same ground as before.

The COURT.—Very well, it will be admitted sub-

(Testimony of D. R. Fleming.)

ject to the objection.

Mr. HENGSTLER.—And also to similar questions of that sort, because that is for the Court to determine from the language used. [241]

The COURT.—Very well, that will be understood.

Mr. CAMPBELL.—It is understood that that will be the objection.

Q. Will you state whether or not, Captain, in your judgment, that is weather that is ordinarily to be expected, or is unusual weather?

A. I think that is quite usual. Of course, as I said before, it is a long while since I have been there.

Q. Where have you been trading in recent years?

A. I have been trading from Sidney. My last trip was around Cape Horn.

Q. Did *you any* weather of that character on that voyage?

A. No. This was in summer-time, and I had exceptionally fine weather.

Q. This is the last voyage you have made?

A. Yes.

Q. Where have you been trading for the last 8 or 9 years?

A. All over; South America and the Philippines.

Q. Have you ever encountered weather of that character? A. Oh, yes.

Q. Is it usual or is it extraordinary?

A. I do not think it is extraordinary.

Q. Would you state whether or not, in your judgment, you would expect that weather to so strain a well-constructed ship, a well-founded ship, as to cause

(Testimony of D. R. Fleming.)

her to leak as this vessel leaked? A. It might.

Q. Is it ordinarily to be expected?

A. Well, there have been a number of cases where it has done so. The ship "Puritan" very recently went the same way.

Q. The "Puritan" was totally lost?

A. Yes. She was an iron ship; she was a well-founded ship. She sprung a leak coming [242] from Sidney to San Francisco just a few months ago.

Q. Were you in her?

A. No, but I have the second officer who was in her working with me now.

Q. I will describe to you now by reading from the log, from page 10 of this testimony, certain weather:

"A. We left Brest on the 21st at 9 o'clock in the morning. There was a small breeze from the north, shifting from the north to west, and we sailed until the 26th of September, and had fine weather and calm sea. We encountered westerly winds with a choppy sea.

Q. On what day?

A. The 26th of September. There was a swell until the 28th.

Q. What occurred on the 28th?

A. The wind hauled to the southwest, freshening and increased, the sea coming heavy rapidly. The wind shifted to the northwest on the 28th at 2 o'clock in the morning. The weather cleared up, but the sea became very heavy. We had very violent squalls, especially during the watch from 8 o'clock in the morning until noon. The weather became cloudy

(Testimony of D. R. Fleming.)

again in the afternoon with squalls, the sea being very heavy, direction west, northwest. From 8 P. M. to midnight, the sea was still heavier, and the squalls more and more violent.

Q. Are you still on the 28th?

A. Yes, sir; on the 29th the weather became fine, and the squalls less and less violent, the wind decreasing rapidly, there being still a squall. There were times when the ship was rolling heavily, the sea coming from abeam. At 4 o'clock in the afternoon, we found an increase of water in the ship's hold. We found 23 centimeters at 4 o'clock. We pumped at once, and cleared the water from the hold in a quarter of an hour. [243]

Q. What latitude and longitude was the vessel in on that day, the 29th?

A. 38 degrees, 28 minutes north latitude at noon; 17 degrees, 43 minutes west. The vessel was steering south 35 degrees west.

Where was that, Captain, with respect to the southern end of the British Isles?

A. I forget just now.

Q. You cannot tell that without a chart?

A. No.

Q. Now, go ahead and tell what happened next?

A. We saw every day that water was increasing in the hold regularly, about one centimeter every hour.

Q. What did you do with the pumps during that time?

A. We pumped regularly, morning and evening. At 7:20 in the morning and 4:20 at night.

(Testimony of D. R. Fleming.)

Q. For how long a time each time?

A. About 20 minutes each time.

Q. Did you succeed in controlling the inflow of the water by this pumping?

A. By pumping 40 minutes, we cleared the water from the hold.

Q. How long did that go on?

A. Nothing happened particularly until the 22d of November."

That is the Captain's testimony on direct examination. On cross-examination, with respect to the same weather, he testified as follows, reading from page 35:

" 'From midnight of the 26th to midnight of the 27th, weather squally; nice breeze; swell; all sails set.' In the second watch, 'Squally weather; nice breeze; all sails set.' In the second watch, 'Squally weather; nice breeze; all sails set.' In the third watch, 'Squally weather; nice breeze; all sails set.' In the fourth watch, 'Squally weather of little strength; a fine breeze; all sails set.' In the next watch, [244] 'Squally weather; nice breeze; all sails set.' Next watch, 'Cloudy; fine breeze; a few squalls; all sails set.' The next day, 'From midnight of the 27th to midnight of the 28th.' In the first watch, 'Squally weather; strong rain; the wind blows to the southwest, and shifts to the northwest; gaff top-sail and main-jib torn, royals and upper topgallant sails and stay-sails and spanker taken in.' In the next watch, 'The same kind of weather; strong breeze; a large swell from the northwest; the topgal-

(Testimony of D. R. Fleming.)

lant-sails taken in; unbent the main-jib; violent squalls; strong winds; heavy sea; set the topgallant-sails and mizzen stay-sail.' Next watch, 'Cloudy weather and squally; strong breeze; heavy sea from the west, northwest; the same sail as during the preceding watch.' Next watch, 'Squally weather; strong breeze; furled the main sail at 6 o'clock.' Next watch on the same day, 'The same weather; very strong swell; violent squalls.' The next day, 'Midnight of the 28th to midnight of the 29th.' In the first watch, 'Fine weather; some squalls; strong breeze becoming less at the end of the watch.' Second watch, 'Fine weather; fine breeze; set the main-sail; royal, spanker and stay-sail.' In the next watch, 'Fine weather; fine breeze; all sails set.' In the next watch, 'Squally weather; the sea falls more and more; all sails set; tested the steam gear; found an increase of water in the hold; sounded 23 centimeters; cleared the pumps.' In the next watch, 'Fine weather, the breeze softens; all sails set.' The next watch, 'Fine weather; light breeze; all sails set.'

And on that day, did you make any notation in your own handwriting on the log-book with reference to the discovery of water in the hold?

A. Yes, sir; I wrote at the foot of the [245] log not to fail to sound at every watch, and to give an account to the captain; if the water rises slowly and regularly, they must pump in the morning at 7:20 and in the evening at 4 o'clock.

Q. Does that log correctly state the facts as they

(Testimony of D. R. Fleming.)

occurred at the time with reference to the character of the weather? A. Yes, sir.

Q. During all of this time, or any part of this time, was your ship rolling? A. Yes, sir.

Q. Was that the natural roll of an ordinary ship in that kind of weather, or was it an extraordinary rolling?

A. The rolling was caused by this wind which started at the southwest, and shifted to the northwest, the sea having become very heavy by the cross seas, and when the wind shifted to the northwest, the wind decreased, and the vessel not being stayed by the sails, rolled heavily.

Q. It is not usual if a vessel rolls very heavily, that is, more than is expected of her, to make an entry in the log that the ship has been rolling?

A. Generally, but it was neglected.

Q. Was there a laboring of the ship prior to the leak starting, which was unexpected or unusual?

A. Yes, sir; the day after that night, the wind shifted from the southwest to the northwest.

Q. Was the laboring of the ship upon that occasion very extraordinary?

A. The ship labored less than she did later after that storm at the Falkland Islands, but she did labor very much.

Q. Is it not usual for any ship to labor more or less in a cross sea without making water?

A. Certainly, the 'Duc d'Aumale' [246] itself did it many times, probably, but this time she sprang a leak.

(Testimony of D. R. Fleming.)

Q. Then that must have come from some weakness of the ship before she started, did it not? There must have been some weakness?

A. I don't think so.

Q. How can you account for the ship springing a leak in weather which was fine, all excepting during one or two days at the most, and that weather not very bad, no storms?

A. I cannot give any other explanation.

Q. Then the only explanation that you have to give is that the ship strained in this kind of weather, and started a leak. That is the only explanation you can give? A. Yes, sir.

Q. After the leak was started, how long did the good weather continue?

A. Variable weather, up to the storm that we had in the west of the Falkland Islands.

Q. About what date was that?

A. The 22d of November."

Now, Captain, I will ask you whether or not the character of weather detailed by those entries in the log was in your judgment the usual weather you may expect at sea, or the unusual weather?

A. Oh, it is quite usual.

Q. I will ask you whether or not in your judgment the kind of a sea that would be produced by that weather is the usual or the unusual sea to be expected? A. The usual.

Q. Do you use the Beaufort Scale?

A. Well, I have used it, but it is some time ago now. I am not quite familiar with it.

(Testimony of D. R. Fleming.)

Q. When you get into a gale of wind, we will say an ordinary gale, what do you shorten down to?

A. It all depends on the strength of the gale.

Q. We will say an ordinary gale of wind?

A. Of course, that depends on the ship, too. Some ships will [247] carry more canvas than others.

Q. What sail would a ship be carrying when she was shortened down under storm sails?

A. She would be under probably the top-sails. Some ships would have her fore and mizzen top-sails off; other ships might have their three upper top-sails off; others might have nothing but a lower top-sail and stay-sail.

Q. It depends on the ship?

A. It depends on the ship. In a heavy gale nearly every shipmaster takes everything off except the lower top-sail and some fore and aft-sails, to steady her.

Q. Some of her head-sails and some of her stay-sails? A. Some of her stay-sails.

Cross-examination.

Mr. HENGSTLER.—Q. Captain, the kind of a sea which happens to prevail at any particular time, is it dependent upon the wind? A. Yes, sir.

Q. Entirely? A. Well, that is my experience.

Q. Upon the wind which prevails at the time?

A. Yes, or previous; I have seen a very heavy sea with no wind at all; we have not had wind for perhaps two days and we would have a heavy sea; the wind had been prevailing there sometime previously.

Q. From the fact that the master of a two-masted

(Testimony of D. R. Fleming.)

ship or bark furls certain sails in certain weather or certain winds, can he from that make any conclusion as to what sails should be furled in a three-masted bark?

A. Well, hardly; you can form an opinion.

Q. But you cannot form any definite conclusion?

A. No, you cannot draw any definite line.

Mr. CAMPBELL.—Q. Have you ever been in a three-masted iron bark? [248]

A. Yes; Oh, excuse me, they have all been three-masted ships and four-masted ships. A four-masted bark rigged and a three-masted square rig.

Q. The difference is that you would have no yards on the aft mast? A. No yards on the aft mast.

Q. If a ship had been rolling heavily at sea, would you expect to find an entry to that effect in the log?

A. Oh, yes.

Q. Is it usual and customary, or is it unusual?

A. It is always usual. Of course, some mates neglect that, but we always expect them to do it.

Mr. HENGSTLER.—Q. And even in your ships, the ships that you have commanded, the mates have neglected to make such entries, have they not?

A. Well, I would not like to say definitely that they have neglected; I would not like to say that I remember of their neglecting it. I generally have a look at it myself.

Q. You would expect them to make such an entry?

A. I would expect them to make it.

Q. Do you know what the custom is with reference to French ships? A. No, I do not.

(Testimony of D. R. Fleming.)

Q. Do you know the French bark "Duc d'Aumale"? A. No, I have never seen her.

(A recess was here taken until 2 P. M.) [249]

AFTERNOON SESSION.

Testimony of Eben Curtis, for Libelant.

EBEN CURTIS, called for the libelant, sworn.

Mr. CAMPBELL.—Q. Where do you reside, Captain? A. Alameda.

Q. Were you during any period of your life a ship-master? A. Yes.

Q. You are not following the sea at the present time, are you? A. Not at the present time.

Q. Did you hold an American license or a British license? A. An American license.

Q. How many years did you follow the sea?

A. About 37 years.

Q. How many years were you master?

A. A little over 30 years.

Q. Were you ever master of an iron or a steel vessel? A. Yes, sir.

Q. A deep sea vessel?

A. A deep sea vessel; yes.

Q. What was the largest vessel you commanded?

A. The "Tillie E. Starbuck."

Q. Was she for many years a well-known vessel out of this port? A. She was.

Q. What was her rig? A. A full-rigged ship.

Q. A four-masted ship? A. Three-masted.

Q. The difference between a three-masted ship and a three-masted bark, is that the ship carries yards on

(Testimony of Eben Curtis.)

her mizzen mast and the bark does not?

A. Yes; a three-masted bark will have two mizzens rigged with yards and one without yards.

Q. Captain, how long did you command the "Tillie E. Starbuck?" A. For 17 years. [250]

Q. In what trade, Captain, did you run with her?

A. Well, most of the time between New York and San Francisco, or Portland, Oregon, with two or three voyages to the East Indies and to China.

Q. How many times, in your experience, do you suppose you have passed around Cape Horn?

A. Oh, I should say 20 times or more.

Q. What kind of weather do you ordinarily expect to encounter on a voyage from the South Atlantic to the South Pacific, around the Horn, in the months of November and December?

A. Well, we expect most of the weather to be pretty bad.

Q. What effect does the weather that you may expect have upon the ship? Describe it as well as you can, so that in that way to indicate to us the character of the weather.

A. Well, strong winds kick up heavy seas and in all heavy seas a ship will strain more or less.

Q. Will she have any water on her deck?

A. If she is a loaded ship she will most always have water on the deck, more or less.

Q. Have you ever found it necessary to shorten sail when you are in the vicinity of the Horn?

A. Yes, very frequently.

(Testimony of Eben Curtis.)

Q. Would you, if you were in the vicinity indicated on the chart marked Libelant's Exhibit "C" to the northwestward of the Falkland Islands, which is approximately the location of the "Duc d'Aumale" on the 22d of November—do you see that there?

A. Yes.

Q. Now, bearing that location in mind, Captain, I will ask you whether or not the weather you there encounter is in any very great particular different from that in the immediate vicinity of the Horn?
[251]

A. Well, the winds are very much the same, but the seas are very differnt.

Q. What difference is there, Captain?

A. As a rule, you are closer to the land and the wind is mostly off the land, the greater part of it, and you do not experience as heavy seas there as you would down in the unbroken ocean.

Q. State whether or not you might expect in that vicinity seas such as would throw water on to the deck of your vessel?

A. Oh, yes, a great deal of it.

Q. Is an experience of that sort confined to any particular waters or any particular localities of the oceans, taking the water on the deck of your vessel?

A. No. In all oceans, where you are far enough south or far enough north to get bad weather, you have the same experience, in a great measure.

Q. When you strike the ordinary bad weather you may expect in the vicinity indicated by the chart, what kind of sail would you carry?

(Testimony of Eben Curtis.)

A. It depends altogether upon the weather we experience there at the time.

Q. Well, if it is the usual bad weather, what sail would you carry?

A. Well, if it is blowing a moderate gale we would carry the whole top-sails and the whole foresails. With a heavy gale we would probably come down to the three lower top-sails.

Q. If you should encounter a gale of wind in that vicinity which compelled you to shorten sail to your three lower top-sails, would that be an unexpected and an unusual occurrence?

A. No, it would be more unusual if you did not have some weather of that kind.

Q. If you were encountering such weather as compelled you to shorten sail to your three lower top-sails, will you state whether or not, Captain, you would expect a loaded vessel to [252] have water on her deck?

A. We should expect her to have water on her deck, yes.

Q. Will you state whether or not, Captain, it is usual or unusual to have your ship so roll at sea that she will roll her bulwarks under?

A. Well, that is a very heavy rolling when you roll your bulwarks under.

Q. Well, do you expect it?

A. We get it sometimes, yes.

Q. Is it necessary to roll your bulwarks under to take water on the deck? A. No, sir, not at all.

(Testimony of Eben Curtis.)

Q. Captain, did you hear the testimony read this morning? A. Yes.

Q. For the purpose of saving time I will ask this question: have you in mind the condition of the weather which was detailed in the log for the gales we will call it, off the Falkland Islands?

A. I think I have, yes.

Q. Bearing in mind what you heard read from the log, I will ask you whether or not in your judgment, Captain, that weather was the usual or the unusual, the ordinary or the extraordinary weather such as you might expect to encounter or would not expect to encounter in that vicinity at that season of the year?

A. I should think it would be about the usual thing. Sometimes you go down there with very little bad weather, but you almost always get some.

Q. In passing from the Atlantic to the Pacific, in the month of November—from the month of September to the month of April, in the southern summer, from which direction is the prevailing wind?

A. From the west.

Q. And if that makes any sea it makes a head sea in going around there?

A. Yes, a head sea in coming from the Atlantic to the Pacific. [253]

Q. Do you call going from 50 South Atlantic to 50 South Pacific around the Horn?

A. That is what we generally designate around the Horn.

Q. Now, Captain, have you in mind the testimony from the entries in the log, which I read this morn-

(Testimony of Eben Curtis.)

ing, of the weather that was encountered on the 26th, 27th and 28th and 29th days of September, immediately after the vessel left Brest? A. I have.

Q. Captain, I will ask you to state whether or not that weather was in your judgment unusual or unexpected weather, or was it the usual expected weather in that vicinity in that season of the year?

A. Oh, it was weather you could expect there at that time.

Q. How would you characterize that weather?

A. As a moderately strong—well, not much more than a strong breeze; you might say that it was more fresh winds; not heavy at all.

Q. If you had a well-constructed, well-founded and well-stowed ship, in all respects seaworthy when she left Brest, would you have expected her to have so strained in that kind of weather as to have caused the leakage that the “Duc d’Aumale” suffered from in this case?

A. I should not expect her to strain, or any well-founded vessel to strain in that weather to make her leak.

Q. If a vessel had encountered severe rolling such as might strain her, would you expect an entry to that effect to be made in the ship’s log?

A. It should be.

Q. If you were looking over a log, would you expect to find such an entry if that weather had been encountered?

A. Yes sir, I would expect that log-book would give a proper description of the weather and any-

(Testimony of Eben Curtis.)

thing unusual that occurred.

Q. Would the sea which would be made or created by the weather [254] as detailed on the 26th, 27th, 28th and 29th of September, in your judgment, be a usual or an unusual sea for that vicinity in that season of the year?

A. Nothing unusual about it.

Q. Does a ship roll more in a cross sea than she does in a straight running sea?

A. Well, she rolls differently. The sea does not make the vessel roll as a whole; one sea would twist her one way and the other would twist her another way.

Q. In your judgment which produces the greater strain upon a vessel, running before the sea or running into a head sea?

A. Well, going into a head sea produces the most strain on the vessel if you are going anyways fast when driving her into the sea.

Q. Have you ever transported a cargo of coke and pig iron? A. I have not.

Q. What kind of cargoes have you carried?

A. Well, I think almost everything except coke; I have carried plenty of pig iron.

Q. You have carried plenty of pig iron?

A. Yes.

Q. Mixed with other general cargo?

A. Mixed with other general cargo.

Q. Have you ever carried it with other cargo which was lighter than the pig iron?

A. Oh yes, a great deal lighter.

(Testimony of Eben Curtis.)

Q. I mean lighter to the same bulk.

A. Oh yes, a great deal, a great difference.

Q. Now, Captain, I want to read you from the testimony, or rather, I will state it here: The testimony in this case shows that on the voyage in question the "Duc d'Aumale" carried 2,660 tons of cargo, of which 1,900 tons were carried in her lower [255] hold and 760 tons in her between-decks; of the 2,660 tons 660 were pig iron; when she started on her voyage 60 tons of pig iron were stowed in her between-decks and 600 tons in her lower hold; that is to say, that of the 1,900 tons carried in her lower hold 600 were pig iron; and of the 760 tons in her between-decks 60 were pig iron; the 600 tons in the lower hold were stowed in one body immediately aft of the main hatch, occupying a space about 63 feet long and 23 feet wide at one end 36 feet in width at the other. Now, I will ask you, Captain, whether or not in your judgment such stowage was good stowage and if not, why?

Mr. HENGSTLER.—If your Honor please I desire to reserve an objection to this question upon the ground that the witness has not qualified as an expert on stowage; that, on the contrary, he has stated that he has had no experience whatever in the carriage or stowage of coke and pig iron in vessels.

The COURT.—Very well; he can answer the question; he says he has had experience in pig iron.

Mr. CAMPBELL.—Q. I will go a little further with this: Captain, what kind of cargoes have you carried with pig iron?

(Testimony of Eben Curtis.)

A. I have carried pig iron with coal and pig iron with the ordinary general cargo that is brought from the East to this coast.

Q. Would the coal be lighter in proportion to bulk than the pig iron? A. Yes, sir.

Q. Have you ever carried a coke cargo?

A. I have never carried coke.

Q. You know what coke is, of course?

A. Oh yes, I know what it is.

Q. And you know that it is lighter than coal, is it not, that is, for the same bulk? [256]

Q. I will ask you now, Captain, bearing in mind the distribution of weights as I have given them to you, the 1,900 tons in the lower hold, of which 600 were pig iron and the balance coke, and 600 tons stowed in one body immediately aft the main hatch, occupying a space 53 feet long by 23 feet wide at the aft end and 36 feet wide at the forward end; I will ask you whether or not, in your judgment, such stowage was good stowage?

Mr. HENGSTLER.—If your Honor please, I have to renew my objection. I wish to specify the objection in this regard: while it may be that the witness has testified that he has carried pig iron he has testified also that he never carried pig iron in conjunction with coke; it makes all the difference in the world what articles of merchandise he has carried in connection with pig iron because there are entirely different rules of stowage prevailing accordingly as the other articles are of one kind or are of another kind. We can receive no light whatsoever

(Testimony of Eben Curtis.)

from the fact that he has carried pig iron with some other articles on the question, as to whether pig iron carried along with coke must be carried in this way in which it was carried in this vessel or carried in some other way.

The COURT.—I will let him answer the question.

Mr. CAMPBELL.—And I will supplement this by further testimony if the answer of the witness is such as I personally believe it will be; it will be supplemented by other testimony which will emphasize the contrast.

A. I should call it bad stowage.

Q. Why?

A. Because the weight is unevenly distributed on the ship. The coke is so much lighter than the pig iron that there would be too much weight come in one place on the ship where the pig iron was stowed.
[257]

The COURT.—Where was this pig iron stowed? Stowed back of the hatch?

Mr. CAMPBELL.—From the main hatch aft; from the after part of the main hatch for a length of 63 feet.

Mr. HENGSTLER.—And 60 tons in the between-decks.

Mr. CAMPBELL.—I meant in the lower hold of the vessel.

Mr. CAMPBELL.—Q. I will ask you whether or not, in your judgment, Captain, the restowage of the pig iron which was afterwards made at Buenos Ayres, which was as follows—I will put it this way:

(Testimony of Eben Curtis.)

the testimony in the record will show that after repairs were effected to this vessel at Buenos Ayres the cargo was restowed as follows: between the foremast and the main hatch 60 tons on the port side, and from 50 to 60 tons on the starboard side, loosely stowed; in a block forward of No. 3 hatch—and that, Captain, as I understand it, is the hatch that is just forward of the mizzen-mast, is it not? A. Yes.

Q. About 22 feet in length, 4 feet high and the width of the vessel, about 300 tons, very closely stowed; aft of No. 3 hatch, in a block, in the run of the vessel, extending to the aft bulkhead, some 30 feet in length and a height of about 3 feet, quite closely stowed, and amounting to some 180 or 200 tons. I will ask you whether or not, Captain, in your judgment, that was better stowage than the original stowage of the pig iron?

A. I should say it was a great deal better stowage.

Q. Why?

A. Because it divided the heavy weight over the ship more evenly.

Q. Now, Captain, there is testimony in this record to the effect that it was necessary to stow this cargo in lumps so as to give the vessel the proper trim; I will ask you whether or [258] not the moving of the 60 tons—the 110 tons or the 120 tons between the main hatch and the foremast forward so as to be between the main hatch and the foremast would be offset in the trim of the ship by moving the other quantity further aft in the vessel?

A. I should say it was.

(Testimony of Eben Curtis.)

Q. Could you trim your ship so as to have her draw so much by the head and so much by the stern just as well by distributing this cargo over the bottom of the ship as piling it in one lump as per the original stowage? A. Just as well.

Mr. HENGSTLER.—Of course, if your Honor please, those questions are all considered as being subject to my objection?

The COURT.—Yes, all will be considered under your objection.

Mr. CAMPBELL.—I think that is all.

Cross-examination.

Mr. HENGSTLER.—Q. Captain, how long ago did you go to sea as a master of ships?

A. I have not been to sea for a little over eight years now.

Q. What have you been doing during those eight years?

A. Well, for the first five years I was Marine Superintendent for the American-Hawaiian Steamship Company here in San Francisco; since then I have been connected with steam schooners on the coast.

Q. Connected in what way?

A. Well, I am part owner, and for the last three years I have had a contract with the City of Oakland to take the city garbage out to sea and dump it, for which we employ a steam schooner.

Q. And when was it you were at sea in command of a sailing vessel the last time?

A. It is between 8 and 9 years ago.

Q. What vessel was that?

(Testimony of Eben Curtis.)

A. That was the "Tillie E. Starbuck." [259]

Mr. CAMPBELL.—Just allow me to interrupt you, Mr. Hengstler to ask one question right here. What size vessel was she, Captain?

A. She was 2,031 tons gross; 1,929 tons net.

Q. What was her dead weight capacity?

A. About 2,900 tons.

Mr. HENGSTLER.—Q. Did you ever carry pig iron in the "Tillie E. Starbuck"?

A. Yes, carried a great deal of it.

Q. You carried a great deal of pig iron?

A. Yes, sir.

Q. Between what places?

A. Between New York and Portland, Oregon, and between New York and San Francisco.

Q. You say the "Tillie E. Starbuck" was a full-rigged ship? A. A full-rigged iron ship.

Q. Do you know what the French vessel "Duc d'Aumale" is?

A. Only from what I have heard here to-day.

Q. You do not know the "Duc d'Aumale," do you?

A. No.

Q. You have never seen her, so far as you know?

A. Not to my knowledge.

Q. You do not know whether she is a bark or whether she is a ship or what kind of rig she has?

A. No, I do not, any more than judging from Mr. Campbell's description of the stowage, she must have been or she must be either a ship or a bark, one or the other, from the way he speaks of the hatches.

Q. That is your judgment from what you have

(Testimony of Eben Curtis.)

heard from Mr. Campbell? A. Yes.

Q. But you know nothing about her at all?

A. Nothing personally; no.

Q. In loading a ship, Captain, can you tell how she should be loaded, without having any acquaintance with her at all?

A. Well, that is a part of every ship master's education. It is a part of his work to learn and superintend the stowage of cargo; he judges by the model of the ship that he is loading, [260] the shape of the ship and her size and her dimensions and from the cargo that is to go in her.

Q. And it depends entirely upon the model and upon the size and upon the form and upon the proportions of the ship as to how she should be loaded?

A. A great deal depends upon that, yes.

Q. Would you be able to load a ship in this port, if you were asked to load her and had never seen her before?

A. Well, as soon as I would examine the ship to see what she was I should be able to load any ship and load her correctly.

Q. You think even without knowing how she behaves at sea you would be able to load her safely, do you?

A. I think I should, yes. I think I have had that experience that I should know.

Q. Is the question of proper stowage according to your idea a theoretical question? Can it be settled theoretically, or is it necessary that one should have some practical experience with the vessel itself?

(Testimony of Eben Curtis.)

A. Well, your practical experience with the vessel itself would help you.

Q. It would help you very much, would it not, Captain? A. It would help you, yes.

Q. For the purpose of its being safe in stowing her, and that she would behave well after the stowage, you would have to know how she behaved in the past with similar cargo, would you not?

A. That would be an assistance.

Q. Is it not necessary?

A. Not entirely necessary, no.

Q. You would not say it was necessary?

A. Not necessary, no.

Q. Would you be taking chances in loading a vessel that you [261] did not know anything about, so far as her past behavior is concerned?

A. I do not think so; I think any thorough seaman, judging the vessel as he found her, the shape of the vessel, the model of the vessel, he would know how to load her. If he knew his business he would.

Q. Does your answer apply to the loading of the vessel with any kind of cargo or only to particular cargo?

A. Well, I think any kind of cargo. As long as he knew the cargo his first question would be what the weight of the different cargoes would be, and if he knew his business he would be able to distribute them in his ship to make her seaworthy.

Q. You would be able to do that?

A. I should, I think; yes.

Q. But you would be greatly aided if you knew

(Testimony of Eben Curtis.)

something of the ship and her past, would you not, in doing it properly?

A. It would help, it would help.

Q. Supposing you had a brand new ship that had never sailed before, a ship that has been recently constructed, would you without any aid from anybody be able to load her with any particular cargo safely, or would you consult someone?

A. Oh, I think I would be able to load her without consulting anybody, and load her right.

Q. Well, if you wanted to be sure about it, would you consult anybody?

A. I do not think I would unless it was some cargo I was thoroughly unfamiliar with, and then I would have to get the weight and the form it occupied per ton.

Q. You would not consult the builder of the ship, would you? A. It is not necessary at all.

Q. Do you think the builder of the ship could give you any aid in stowing an entirely new ship? [262]

A. Well, the aid would be on the ship. If the builder of a steel ship would furnish the plan of the vessel, that plan would be there for the Master to look at, and when he had seen that plan and studied it a little he would know how to load that ship.

Q. If you saw the plan of an entirely new ship, you would know how to load the ship, you would know how she was going to behave with any particular cargo in the future, would you?

A. I think I would get very near to it.

Q. You would feel pretty nervous about it, Captain, would you not?

(Testimony of Eben Curtis.)

A. No, I do not think I would at all.

Q. Would you feel sure that that cargo was properly loaded simply by looking at the plan of the ship and not consulting the builder as to its construction?

A. I have had a long experience with ships and I never did consult the builder yet; I never have had occasion to.

Q. Did you ever load a ship for the first time, when she went on her first trip on the ocean?

A. No, I never have.

Q. And that is the reason why you never consulted the builder, is it not?

A. No, not at all; I do not think that would make any difference at all, so far as the builder goes.

Q. I want to be sure about your position in this regard, Captain; you think past experience with a ship is not necessary for the purpose of stowing her with any particular cargo safely?

A. No, I do not think it is, not if the man knows his business.

Q. You say that that was purely a theoretical question, as to the stowage of the vessel?

A. What do you mean by a theoretical question?

Q. That it is independent of past experience?
[263]

A. Yes, I think it is independent. I have had a great deal of experience myself. If I had not had that experience when I was a young man I would have consulted other people to get help.

Q. I do not want to be unfair with you, Captain, I mean past experience with any particular vessel;

(Testimony of Eben Curtis.)

you do not need past experience with a particular vessel in order to stow her properly—is that your idea? A. Not necessarily.

Q. You do not need it? A. No, I do not need it.

Q. Captain, suppose you had two sister ships, built on exactly the same plan, exactly the same types of ships, would you say that they would have to be stowed in exactly the same way in order to make it proper stowage?

A. I do not see why they should not be stowed just alike.

Q. You have never heard or never read, have you, that two ships of exactly the same type have to be stowed different in accordance with the experience had with them in previous voyages?

A. I never did; no.

Q. You never heard that?

A. No, I never heard that.

Q. Have you ever carried coke, Captain?

A. No, I never did.

Q. And never in connection with any other cargo?

A. No.

Q. Would you say that the carriage of coke in connection with pig iron—that is, the stowage of coke in connection with pig iron—would have to be made in the same way and in accordance with the same rules as the stowage of any other cargo in connection with pig iron?

A. Well, I should say the same rules as to any other cargo of the same weight as the coke.

Q. What cargo would be of the same weight; for

(Testimony of Eben Curtis.)

instance, would [264] coal be of the same weight?

A. No, coal is heavier than coke.

Q. It is much heavier, is it not? A. Yes.

Q. The rules of stowage as to coal in connection with pig iron would be entirely different from the rules for the stowage of coke in connection with pig iron, would they not?

A. Yes. It would not be necessary to distribute the weight just the same with the pig iron and the coal as it would with the coke.

Q. You would have to follow a different method altogether? A. Yes.

Q. And so with any other cargo connected with pig iron, would you not, you would have to consult the weight of the cargo?

A. You would have to consult the weight of cargo and the space it was going to occupy at the time.

Q. Captain, can you tell about the strain which the pig iron, in the case of the "Duc d'Aumale" exercised upon the hull of the ship during the time when she was loaded according to the Rotterdam stowage, as compared with the time she was loaded under the Buenos Ayres stowage, which was the greater strain?

A. The strain under the original stowage would come more in one spot. It would not be distributed. For instance, there is a great pressure up under the ship as she goes down in the water. The water pressure is very strong pressing up. If you put the weight all in one place the pressure presses the other parts up, and right there where that heavy weight

(Testimony of Eben Curtis.)

stops is a weak spot in your ship under that stowage; whereas, if you spread the weight out more over the bottom of the ship, more forward and more aft, then the pressure on top and the pressure underneath is more equalized. [265]

Q. On what part of the ship was the pressure exercised during the original stowage—the stress?

A. The great stress would be at the end of that pile of pig iron, both the forward end of it and the after end.

Q. Captain, would not the stress be exercised upon the whole area which that pig iron covered in the hold of the ship?

A. Yes, but you would have the water pressing up underneath on the ship, with the same pressure underneath her, with an unequal weight on the bottom of the ship pressing down to offset the pressure of the water underneath.

Q. But the pressure on that part which was covered was uniform, was it not?

A. Yes—well, you mean under the pile of pig iron, do you?

Q. Yes.

A. That is uniform, but becomes a weak spot at the end of the pile, or they have not got the same pressure down to offset the pressure of the water underneath.

Q. If you put any iron in that weak spot then there would be a stress on the weak spot, would there not, which before that did not exist?

A. If you spread your iron out to cover more of

(Testimony of Eben Curtis.)

the water you would have a more even pressure down on your ship. As she was stowed the second time, as I understand it, there was a pile put pretty well forward, between the forehatch and the main-hatch, and a pile right in the run of her, at the very aft end, and a pile practically in the same place where there was originally; instead of being in one pile it was divided into three piles which spread over the bottom of the ship and made a more equal distribution of the weight.

Q. Captain, can you compare the parts of the ship on which those three piles were afterwards spread, so far as their [266] strength is concerned? Which is the strongest part of the ship?

A. Well, the strongest part of the ship is really the ends of the ship, more especially the forward end.

Q. In every ship? A. Yes, sir.

Q. Would that be so in every ship, Captain?

A. I think so, in every ship.

Q. Now, Captain, do you know that, or are you merely guessing?

A. I am not guessing at all. The strongest part of the ship is the forward end of it. She gets the hardest usage than any part of the ship.

Q. How about the other extremity, the stern?

A. The stern does not get the hard usage that the bow gets.

Q. How does it compare in strength with the middle part of the ship?

A. Well, in some ways the stern is stronger than the middle; in some ways.

(Testimony of Eben Curtis.)

Q. In what ways?

A. In her up and down strain; with the stern of the vessel you pull straight and force the edge more,

Q. Captain, if it is a fact that the stern of a ship is the weakest part of the ship, and the portion of the ship on which under the original stowage this pile of pig iron was lying is the strongest part of the ship, would you still adhere to your original opinion that the second stowage would be better because it distributed the weight better?

A. I do not know that I understand just what you mean.

Q. If it appeared as a fact that the stern of the ship is the weakest part of the ship, and particularly with the "Duc d'Aumale" that it is the weakest in that type of a vessel, would you still say that some of that heavy pig iron should be stowed in the stern of the ship?

A. I think you would have to have some of it stowed in the [267] aft end of the ship and some in the forward end and some in the middle; you must distribute your weight.

Q. And you would say so independently of the strength of those portions of the ship, that although the middle part is the strong part and the extremities are the weak parts, you would still put some of the heavy cargo into the extremities, would you?

A. I do not think the middle part is any stronger. The ship is built of a practical uniform strength.

Q. Captain, is it not a fact that the middle part, the part upon which this pig iron was stowed in the

(Testimony of Eben Curtis.)

space, is uniformly the strongest part of the ship; is not that the fact? A. I do not see why it is.

Q. You do not see why it is? A. No.

Q. But you do not know whether it is, or not, do you?

A. I do not know that I do know exactly the strength of it.

Q. You do not know? A. No.

Q. You certainly do not know whether it was in the "Duc d'Aumale," or not?

A. No, I do not know anything about the "Duc d'Aumale."

Q. Captain, can you tell to what extent a ship at sea rolls and pitches, and as far as stress and strain are concerned, can you tell that if you know nothing about it except what the weather is at the time, what wind is blowing?

A. Well, only in a general way, from general experience.

Q. The strain and the rolling would depend, besides upon the wind, upon what other elements?

A. Something on the model of your ship and something on the amount of sail you were carrying to steady the ship, and then again on the class of sea.

[268]

Q. So, if you do not know the model of the ship you cannot tell what strain she suffers, can you?

A. Only as a general rule.

Q. You cannot tell, can you?

A. Not exactly, no.

Q. And you also know, do you not, Captain, that

(Testimony of Eben Curtis.)

the action of the sea cannot be read merely from the wind that is blowing?

A. No. Your sea might be made up from a long distance from where you were at that time, made up by different winds.

Q. Although a particular wind is blowing and recorded in the log-book, if it were the only cause of the sea, you would say the sea is moderate; nevertheless the sea may be exceedingly heavy, may it not, during the period while that wind is blowing?

A. Yes, sometimes you get quite a heavy sea with very little wind, and a wind, perhaps, from a different direction from what the sea is.

Q. Captain, are you sure that during your period of navigation the fact that a vessel rolls or pitches is entered in the log-book? A. It should be.

Q. It is not always, though, is it, Captain?

A. I cannot say about that, whether it always is, or not; I know it always should be.

Q. It always should be?

A. Yes; that is what the log-book is for.

Q. The degree of longitude and latitude is always entered, is it not?

A. That is always entered.

Q. And the direction of the wind is entered usually, and the force of the wind? A. Yes, sir.

Q. It is always entered? A. It should be.

Q. Well, is it not always entered? Is there not a special heading for those things in the log-book?

[269]

A. There is a special heading for it, and if the log

(Testimony of Eben Curtis.)

is properly kept it should be there.

Q. But there is no special heading for recording the fact whether the vessel pitches or rolls, is there?

A. Well, there is always a place for the making of any general remarks.

Q. And in that place for general remarks, you put, among other things, the way the vessel acts, if she acts extraordinarily, do you not?

A. Yes, anything out of the usual.

Q. Is rolling at sea something out of the usual?

A. No.

Q. Captain, who asked you to come here as an expert witness on these questions you have been asked about? A. Mr. Campbell.

Q. How long ago?

A. Oh, I think some two or three months ago was the first time he spoke to me about it.

Q. Did Captain Meyer, or anybody from the firm of Meyer, Wilson & Co., anybody from their office ever ask you?

A. No, I don't know anybody connected with that office.

Q. They did not speak to you about it?

A. No. I only know them by reputation.

Q. Have you read over the testimony in this case?

A. No; I don't know anything about it except what I have seen here to-day.

Redirect Examination.

Mr. CAMPBELL.—Q. Captain, has any conversation that you have had with me influenced your testimony at all? A. Not in the least.

(Testimony of Eben Curtis.)

Q. Would the knowledge of how a vessel might act in a seaway, affect your judgment as to the strain which would be produced upon her hull by the stowage of pig iron in one lump as described in this case? [270]

A. Just repeat that once more, please.

Q. I say would any knowledge as to how the vessel might act in the seaway affect your judgment as to the strain which would be produced upon the hull of the vessel by the storage of the pig iron in one body as described in my previous question?

A. No, I don't think it would.

Q. Would the way in which a vessel might act in a seaway affect your judgment as to the storage of the cargo with respect to the stiffness of the vessel in any way? A. Yes.

Q. For our enlightenment, Captain, just what do you mean by the stiffness of the vessel?

A. Well, if you put too much weight in the bottom of the ship and not enough high up to counter-balance it the ship will not lay over so quick, so easy; if she gets rolling in a sea, she is bound to roll, nothing can stop her rolling, but if she is too stiff she goes over and comes back with a quick jerk and goes back the other way with a quick jerk, which is very hard on a ship; but if she is loaded what we call just right, just stiff enough, she goes over more gradually and fetches up more easily and starts to come back without that jerky motion which is so hard on the spars of a ship.

Q. With respect to the question of stiffness would

(Testimony of Eben Curtis.)

or would not knowledge of the behaviour of a vessel in a seaway help you in determining what was the proper distribution of the weight of the cargo so far as up and down distribution is concerned?

A. It would help you some, but the way the cargo is stored, whether it is stored right or not, more depends on that as to the action of the ship herself, whether she acts bad or well.

Q. You said there might be a difference as to the rules in stowing coke and iron or coal and iron; which would be the worst stowage, iron lumped in one body with coke or iron lumped [271] in one body with coal?

A. Well, they would be bad in either case.

Q. But comparatively speaking?

A. Comparatively speaking the coke would be worse than the coal.

Q. Why is that?

A. Because it is not so heavy.

Q. The 60 tons of pig iron which was stowed in the between-decks in this particular case, was stowed there for the purpose of counteracting that stiffness that you spoke of? A. I suppose so.

Q. It would make her roll easily?

A. It would make her roll easily.

Q. If they had not been there she would have been too stiff?

A. Any ordinary vessel would. It seems to me from the distribution of the cargo, that she had too much in the hold, more than she should have. It seems to me she had rather more weight in the hold

(Testimony of Eben Curtis.)

in comparison with what she had between decks. That again would depend a great deal on the dimensions of the ship; that I do not know.

Q. That is a pure theory, a general theory, that there should be two-thirds in the bottom and one-third in the between-decks?

A. Different ships are different about that according to their beam and depth.

Mr. CAMPBELL.—Q. That is for the purpose of arranging the stability of the ship as far as stiffness is concerned? A. Yes, sir.

Mr. HENGSTLER.—Q. If it should appear that in this particular vessel the pig iron in the bottom was placed in one lump on top of the bottom, which is the strongest part of the [272] vessel, you would call that proper stowage, wouldn't you?

A. No, sir, I should not.

Q. You would not call it proper stowage even although it covered a large area, and that large area is the strongest part of the bottom?

A. That part of the ship would not be any stronger than the part forward or the part after.

Q. You still adhere to your opinion that the stern part is just as strong as the part in which it was stowed?

A. This ship, the way she was stowed, had a long space without any pig iron in it.

Q. Would you be willing to admit that if she was actually stowed as she was, by people who had had past experience with her, who knew how she behaved on past occasions, with that kind of cargo and simi-

(Testimony of Eben Curtis.)

lar cargoes, would you be willing to admit that they were likely to know more about how she should be stowed than you who had never seen her and do not know anything about her construction and as to her lines or type? Would you be willing to admit that?

A. It looks to me as though the master of the ship must have realized when she was discharged at Montevideo, that she was stowed wrongly or else he would not have restowed her.

Q. You assume that the master restowed her differently?

A. I assume that, yes, because that is part of his duties.

Q. You assume that? A. Yes, sir.

Q. Supposing it appeared that as far as rolling is concerned she behaved very well under the original stowage, but on a later voyage from Buenos Ayres to San Francisco she pitched more, what would you say to that? Which was the better stowage?

A. Well, the second stowage was the better stowage, no matter what they report as far as pitching or rolling. [273]

Q. You would say so even although she behaved a great deal worse during the second part of the trip than during the first part?

A. I should say so; yes.

Testimony of Robert Gibson, for Libelants.

ROBERT GIBSON, called for the libelants, sworn.

Mr. CAMPBELL.—Q. Were you ever a ship-master? A. Yes, sir.

(Testimony of Robert Gibson.)

Q. For how many years have you followed the sea? A. 39.

Q. Where do you live now? A. Alameda.

Q. In what class of ships did you sail as Master?

A. Well, the last ship that I sailed was a four-masted iron bark. I have sailed for over 27 years.

Q. Have you ever been in a three-masted iron or steel vessel? A. No, sir; not a three-master.

Q. What was the last vessel you sailed in?

A. The "Silberhorn."

Q. Over what waters have you sailed?

A. I have sailed from Liverpool out here, Calcutta and all over the world, Calcutta and the China Sea.

Q. How many times do you suppose you have run to Cape Horn in your experience?

A. I could not say; 18 or 20 times anyhow.

Q. How long is it since you have gone to sea?

A. Five years.

Q. During those five years what were you doing ashore?

A. I have been doing nothing only living ashore.

Q. What kind of weather would you ordinarily expect to encounter in the vicinity of the Horn on a voyage from the South Atlantic to the South Pacific, in the months of November and December?

A. I generally prepared for some bad weather.
[274]

Q. What do you call bad weather?

A. When you get the ship down to three lower top-sails, or two lower top-sails; that is pretty bad weather.

(Testimony of Robert Gibson.)

Q. Was that unusual?

A. No, sir; not unusual down there.

Q. Would such weather be usual or unusual in the place marked "D" on the chart which has been offered in evidence as Libelants' Exhibit "C," being a position to the northwest of the Falkland Islands?

A. You generally have some strong breezes there, and northwest winds.

Q. Just state what you mean by strong breezes?

A. Sometimes you have gales and other times you do not. You will have as bad weather down there as you would off the Horn sometimes.

Q. How would such weather affect your vessel with respect to her rolling or pitching or taking water on deck?

A. A ship will take water on deck if there is any sea on, and if you have heavy weather she is going to roll.

Q. Would it be an extraordinary or unusual occurrence if you encountered weather there that would cause your vessel to roll and take water on deck?

A. No, sir.

Q. State whether or not when you leave the Continent on a voyage to San Francisco, you would expect weather of that character in that vicinity.

A. You would expect bad and good weather, yes.

Q. Were you able to hear the testimony that I read this morning detailing the weather?

A. I cannot hear very well. I heard you read something that I could not hear what it was.

Q. I will read this to you. The captain of the

(Testimony of Robert Gibson.)

vessel was questioned and testified as follows:

“A. Nothing happened particularly until the 22d of November.

Q. Where was the vessel on that day?

A. The vessel was about [275] 49 degrees, 37 minutes south latitude, and 66 degrees, 21 minutes west longitude. On that date the weather was fine until 9 o'clock at night. The wind increased in force rapidly, and we had to take in all sails but the fore-sail, two lower top-sails, and the lower stay-sails. At 11 o'clock, the wind blew a storm and the sea became heavier very rapidly. At 12 o'clock, in a gust, we lost the topmast stay-sail and the mizzen stay-sail. In a while the sea became tremendous, and we lost the fore stay-sail. The ship not being stayed by the sails we had lost, she rolled terribly. The decks were full of water. The decks being full of water, and the ship rolling heavily, we could not get the exact soundings.

Q. Could you pump?

A. No, sir; we could not pump. I went myself in the pump well, and I saw there was an increase of water, but we could not pump because the bottom of the pipe at each rolling was dry, the vessel being on her side. Another survey was made at 4 o'clock in the afternoon, and we saw the same thing, the sea being still very heavy, and the wind shifting to the southwest, the ship in a cross sea. We wore the ship around at eight o'clock. The sea was very high until the 25th of November at 8 o'clock A. M. On the 24th of November, coming around westerly at 2

(Testimony of Robert Gibson.)

o'clock P. M., we wore the ship around to take a starboard tack. I ordered the pumps to be sounded by the carpenter when the ship was upright, and the carpenter reported that he found one meter and 25 centimeters in the hold, so that the water had increased rapidly since the morning. After the wearing of the ship, I set one watch to the pumps, and ordered an examination of the life-boats made to see that they were in order. At 6 o'clock, the wind freshened again, big seas coming from every part; the decks [276] being always covered with water it was very difficult to work the pumps. At 6 o'clock, we found one meter, and 55 centimeters in the hold. At 6 o'clock, I called the crew aft and explained to them the situation, and we resolved to take refuge in the Falkland Islands for the saving both the cargo and the ship. At the same hour we kept her off, and made for the Islands.

Q. We do not need the further details until you get to the place where you beached the ship.

A. That is a few hours later. Both watches were relieving each other at the pumps every half hour, so they were working continually, and I saw that the water did not increase so much while the ship was running before the wind. The ship was steering very badly when we were close to Roy Cove. We entered the Cove at 4:30, and at 4:35 the ship was beached at 500 meters from the entrance of the Cove. At that time the sounding of the pump was 2 meters and 27 centimeters, the ship having a list of 6 degrees to starboard."

(Testimony of Robert Gibson.)

I ask you whether or not in your judgment that was weather which was usual and might be expected in that vicinity on a voyage of that kind at that season of the year or was unusual or extraordinary weather?

A. That is the usual weather. That ship was carrying a foresail all through. That ship never took that foresail in by his log-book. Her stay-sail blew away and I suppose some old sails. The foresail was set all that time. She never took it in.

Mr. HENGSTLER.—Q. You do not know that?

A. I know this by the log-book. The log-book is supposed to give every sail taken in off of the ship.

Mr. CAMPBELL.—Q. What kind of sails do you usually carry [277] on your vessel in preparation for rounding the Horn?

A. Our best sails, and use them all we can.

Q. When you are encountering bad weather such as you might expect on a voyage of that sort, what kind of sail do you carry?

A. According to the weather. If it is blowing heavy we carry what sail the ship will stand. We use our judgment. If we can carry a foresail we know it is not blowing a heavy gale of wind,—if she is carrying a foresail. If you are running before the wind you might. If you are laying to with a foresail with a head reach, you cannot do it. A foresail is a big sail and takes all hands to handle it.

Q. If you have got an extraordinarily heavy gale what do you trim down to?

(Testimony of Robert Gibson.)

A. To two lower top-sails; perhaps even to one lower top-sail.

Q. Would it be unexpected weather on a voyage of that kind if you are compelled to trim down to lower top-sails?

A. No, sir. You always expect something of that kind coming round the Horn. You are always expecting bad weather, summer or winter.

Q. Would the sea which would be raised by the weather of the character described, in your judgment be unusual, extraordinary, unexpected weather or the usual expected weather?

A. You will get a sea most anywhere. You will get sea when calm weather has been on. As long as it has been blowing a few hours you will get a sea on.

Q. That does not answer my question, whether the character of sea raised by this kind of weather, would be usual or unusual or unexpected?

A. No, sir, it is the usual sea.

Q. What kind of weather do you customarily have in that vicinity?

A. Sometimes good weather and sometimes changes. [278] Perhaps 4 hours blowing a gale of wind and at other times it would be moderate. You would be taking in sails a good part of the time working your way around the Horn.

Q. If this vessel was carrying her foresail during all that time what in your judgment was the kind of weather she was having?

A. An ordinary good strong blow; an ordinary

(Testimony of Robert Gibson.)

gale; it was not a heavy gale.

Q. I will read to you the following testimony which the Master gave. On his direct examination he testified as follows:

“Q. Now, Captain, will you describe the first parts of the voyage, referring to your log, day after day, with reference to the weather which you encountered.

A. We left Brest on the 21st at 9 o'clock in the morning. There was a small breeze from the north, shifting from the north to west, and we sailed until the 26th of September, and had fine weather and calm sea. We encountered westerly winds with a choppy sea.

Q. On what day?

A. The 26th of September. There was a swell until the 28th.

Q. What occurred on the 28th?

A. The wind hauled to the southwest, freshening and increased, the sea coming heavy rapidly. The wind shifted to the northwest on the 28th at 2 o'clock in the morning. The weather cleared up, but the sea became very heavy. We had very violent squalls, especially during the watch from 8 o'clock in the morning until noon. The weather became cloudy again in the afternoon with squalls, the sea being very heavy, direction west, northwest. From 8 P. M. to midnight, the sea was still heavier, and the squalls more and more violent.

Q. Are you still on the 28th?

A. Yes, sir; on the 29th the [279] weather be-

(Testimony of Robert Gibson.)

came fine, and the squalls less and less violent, the wind decreasing rapidly, there being still a squall. There were times when the ship was rolling heavily, the sea coming from abeam. At 4 o'clock in the afternoon, we found an increase of water in the ship's hold. We found 23 centimeters at 4 o'clock. We pumped at once, and cleared the water from the hold in a quarter of an hour.

Q. What latitude and longitude was the vessel in on that day, the 29th?

A. 38 degrees, 28 minutes north latitude at noon; 17 degrees, 43 minutes west. The vessel was steering south 35 degrees west.

Q. Now, go ahead and tell what happened next.

A. We saw every day that water was increasing in the hold regularly, about one centimeter every hour."

Whereabouts would that location be with respect to the southern coast of England?

A. It is always off the coast; I cannot say without a chart.

Q. Off to the southwestward of the coast?

A. Yes, sir, it is getting down towards the trades I should think.

Mr. HENGSTLER.—Q. Is it about parallel with the coast of Spain?

A. Somewhere down there; I could not say very well without a chart. I cannot tell exactly now.

Mr. CAMPBELL.—Q. (Continuing.) "Q. What did you do with the pumps during that time?

A. We pumped regularly, morning and evening.

(Testimony of Robert Gibson.)

At 7:20 in the morning and 4:20 at night.

Q. For how long a time each time?

A. About 20 minutes each time.

Q. Did you succeed in controlling the inflow of the water by this pumping?

A. By pumping 40 minutes, we cleared [280] the water from the hold."

Would you consider a ship in a seaworthy condition, if she was leaking so as to require 40 minutes pumping each day to free her?

A. No, sir, I would not. All sails set.

Q. I will describe this further on. That concludes the direct examination. On cross-examination he testified as follows:

"Q. Is this entry in your log correct: 'From midnight of the 26th to midnight of the 27th, weather squally; nice breeze; swell; all sails set.' In the second watch, 'Squally weather; nice breeze; all sails set.' In the third watch, 'Squally weather; nice breeze; all sails set.' In the fourth watch, 'Squally weather of little strength; a fine breeze; all sails set.' In the next watch, 'Squally weather; nice breeze; all sails set.' Next watch, 'Cloudy; fine breeze; a few squalls; all sails set.' The next day, 'From midnight of the 27th to midnight of the 28th. In the first watch, 'Squally weather; strong rain; the wind blows to the southwest, and shifts to the northwest; gaff top-sails and main jib torn, royals and upper topgallant-sails and stay-sails and spanker taken in.' In the next watch, 'The same kind of weather; strong breeze; a large swell from the northwest; the

(Testimony of Robert Gibson.)

topgallant-sails taken in; unbent the main jib; violent squalls; strong winds; heavy sea; set the topgallant-sails and mizzen stay-sails.' Next watch, 'Cloudy weather and squally; strong breeze; heavy sea from the west, northwest; the same sail as during the preceding watch.' Next watch, 'Squally weather; strong breeze; furled main-sail at six o'clock.' Next watch on the same day, 'The same weather; very strong swell; violent squalls.' The next day, 'Midnight of the 28th to midnight of the 29th.' In the first watch, 'Fine weather; [281] some squalls; strong breeze becoming less at the end of the watch.' Second watch, 'Fine weather; fine breeze; set the mainsail; royal, spanker and stay-sail.' In the next watch, 'Fine weather; fine breeze; all sails set.' In the next watch, 'Squally weather; the sea falls more and more; all sails set; tested the steam gear; found an increase of water in the hold; sounded 23 centimeters; cleared the pumps.' In the next watch, 'Fine weather; the breeze softens; all sails set.' The next watch, 'Fine weather; light breeze; all sails set.

And on that day, did you make any notation in your own handwriting on the log-book with reference to the discovery of water in the hold?

A. Yes, sir, I wrote at the foot of the log not to fail to sound at every watch, and to give an account to the captain; if the water rises slowly and regularly, they must pump in the morning at 7:30 and in the evening at 4 o'clock.

Q. Does that log correctly state the facts as they

(Testimony of Robert Gibson.)

occurred at the time with reference to the character of the weather? A. Yes, sir.

Q. During all of this time, or any part of this time, was your ship rolling? A. Yes, sir.

Q. Was that the natural roll of an ordinary ship in that kind of weather, or was it an extraordinary rolling?

A. The rolling was caused by this wind which started at the southwest, and shifted to the northwest, the sea having become very heavy by the cross seas, and when the wind shifted to the northwest, the wind decreased, and the vessel not being stayed by the sails rolled heavily.

Q. Is it not usual if a vessel rolls very heavily, that is [282] more than is expected of her, to make an entry in the log that the ship has been rolling?

A. Generally, but it was neglected.

Q. Was there a laboring of the ship prior to the leak starting, which was unexpected or unusual?

A. Yes, sir, the day after that night, the wind shifted from the southwest to the northwest.

Q. Was the laboring of the ship upon that occasion very extraordinary?

A. The ship labored less than she did later after that storm at the Falkland Islands, but she did labor very much.

Q. Is it not usual for any ship to labor more or less in a cross sea without making water?

A. Certainly, the 'Duc d'Aumale' itself did it many times, probably, but this time she sprang a leak.

(Testimony of Robert Gibson.)

Q. Then that must have come from some weakness of the ship before she started, did it not. There must have been some weakness?

A. I don't think so.

Q. How can you account for the ship springing a leak in weather which was fine, all excepting during one or two days at the most, and that weather not very bad, no storms?

A. I cannot give any other explanation.

Q. Then the only explanation that you have to give is that the ship strained in this kind of weather, and started a leak. That is the only explanation you can give? A. Yes, sir.

Q. After the leak was started, how long did the good weather continue?

A. Variable weather, up to the storm that we had in the west of the Falkland Islands.

Q. About what date was that?

A. The 22d of November." [283]

Now, Captain, I will ask you what your judgment is of the character of weather which was described by the Master in his testimony. Was that the usual, ordinary weather that you might expect or unusual, extraordinary weather?

A. Just the usual, ordinary weather.

Q. How would you describe it yourself in your own language, what kind of weather would you call it?

A. Ordinary weather, just as it was; it is entered in the log that way. They never have had their upper top-sails in. The topgallant-sails were furled

(Testimony of Robert Gibson.)

one night, I think it was.

Q. If you were starting from Rotterdam or Brest, on a voyage to San Francisco, would you expect to encounter weather of that character in that vicinity?

A. Yes, sir; I should expect to.

Q. Would that weather in your judgment, produce any unusual strain upon the ship?

A. No, sir; it should not.

Q. If that ship had been seaworthy, in all respects sound, well founded, her cargo well and properly stowed, in your judgment would such weather have so strained her as to cause her to have sprung a leak?

A. It should not.

Mr. HENGSTLER.—That is subject to my objection.

Mr. CAMPBELL.—It is so stipulated.

Q. Would the sea that would be created by weather of that character, be an unusual condition of sea or the usual condition as you might expect?

A. It is the usual condition.

Q. Is it anything unusual to have water on your decks? A. No, sir.

Q. If a ship has been subjected to unusual rolling such as might strain her, would you expect to find an entry to that [284] effect in the log?

A. You would enter it in the log that the ship was rolling heavily.

Q. Now, Captain, have you ever carried a cargo of pig iron?

A. Not altogether loaded with pig iron. I had some pig iron and coke and all sorts of cargo from

(Testimony of Robert Gibson.)

Antwerp and Liverpool. I had a full cargo of tin out from Liverpool and arrived with a general Antwerp cargo.

Q. Does that often include pig iron?

A. It might be pig iron. It is some time since I had such a cargo.

Q. The testimony in this case shows that on the voyage in question, the "Duc d'Aumale" carried 2,660 tons of cargo, of which 1,900 tons were carried in her lower hold and 760 in her between-decks. Of the 1,900 tons which were carried in her lower hold, 660 were pig iron. This pig iron was stowed in one body immediately abaft the main hatch, square of the main hatch, in a body 63 feet long by 23 feet wide, at the after end and 36 feet at the forward end. In her between-decks were 60 tons of pig iron. I will ask you whether or not in your judgment the stowage of that pig iron in the lower hold was good stowage? A. I don't think it was.

Mr. HENGSTLER.—I object to the question upon the ground that the witness has not qualified himself as an expert of stowage in a case of pig iron and coke being carried in any vessel whatever. I object to it furthermore upon the ground that the question is not complete in that it describes the condition of affairs of the "Duc d'Aumale" in an imperfect way. [285]

Mr. CAMPBELL.—In what way? I will fill it in.

Mr. HENGSTLER.—In so far that it does not mention the fact that the entire cargo space not taken

(Testimony of Robert Gibson.)

up by the pig iron was filled with coke. You can put that in as far as that is concerned.

Mr. CAMPBELL.—Q. My question was of the 1,900 tons in her lower hold 660 tons were pig iron stowed in this one body. The balance was coke, which filled the lower hold practically in the way that all cargoes do.

A. The ship was full of cargo?

Q. Yes.

A. 600 tons of pig iron in the lower hold?

Q. All in one body? A. What length?

Q. 63 feet long, immediately abaft of the main hatch. Before I ask you to answer that question I will ask you this: have you superintended the stowage of cargo at all?

A. I have. Loading a cargo is always done under the supervision of the master.

Q. How many years of experience did you have at that?

A. I have been master of ships 29 years, somewhere about that, I guess.

Q. I understand that included cargoes of all character? A. Pretty nearly everything.

Q. You have not carried a mixed cargo of coke and pig iron? A. No, sir.

Q. But you have carried the two separately with other cargoes? A. Yes, sir.

Q. My question is whether or not in your judgment the stowage of that pig iron in one body in a vessel with coke as described was good stowage?

(Testimony of Robert Gibson.)

Mr. HENGSTLER.—I desire to object to the question upon the ground, in addition to the grounds already stated, that the witness is disqualified from testifying as an expert, because he stated expressly himself that he has had no experience whatever in the stowage of this combination of pig iron and coke.

The COURT.—Let him answer the question.

A. I say it was not good stowage.

Mr. CAMPBELL.—Q. Give us your reasons for that?

A. The reason is there is too much in one space; it ought to have been distributed more; it is all in one bunch—too much of a weight in one place.

Q. After this vessel was repaired at Buenos Ayres, her cargo was restowed so that she had between the foremast and the main hatch 60 tons on the port side and 50 or 60 tons on the starboard side loosely stowed? A. That would be 110 tons.

Q. 110 to 120. In a block forward of No. 3 hatch 22 feet in length, 4 feet high and the width of the vessel, 300 tons very closely stowed. Aft of No. 3 hatch in a block in the run of the vessel extending to the after bulkhead some 30 feet in length and a height of 3 feet to 35 feet, quite closely stowed and amounting to some 180 to 200 tons?

A. She had that aft?

Q. Yes. I will ask you whether or not in your judgment that was as good stowage or poorer stowage than the stowage which she first had when she started on the voyage?

A. A great deal better stowage because it is dis-

(Testimony of Robert Gibson.)

tributed fore and aft on the bottom with the pressure of the water up on the ship. Take, for instance, anything and put a weight on it; we will say a lath, put a weight on any lath right in the center [287] where that full cargo was and the ends will come up. If you put something on the ends of it it will keep it down.

Q. I will ask you whether or not in your judgment such stowage of the pig iron in one body would be worse or better stowage as the other cargo was lighter cargo or heavier cargo?

A. In one body it was worse stowage, certainly.

Q. You do not catch my question. I will ask you whether or not in your judgment such stowage would be worse stowage or better stowage if the remaining cargo was lighter cargo or heavier cargo. I will put the question this way: in your judgment would such stowage of the pig iron in one body produce a greater strain on the vessel if the remainder of the cargo was coke, than it would if the remainder of the cargo was coal?

A. Yes, sir, it would, because the coal is heavier and it would be more weight in the forward part or the after part; in both ends there would be more weight.

Q. A better distribution? A. Yes, sir.

Cross-examination.

Mr. HENGSTLER.—Q. How long is it since you have commanded a sailing ship?

A. About five years.

Q. What was the last ship that you commanded?

(Testimony of Robert Gibson.)

A. The "Silberhorn."

Q. What was she?

A. She was an English ship; an English four-masted bark.

Q. Has your experience as a master or seaman, generally been with English ships?

A. I have always been in English ships. I am an Englishman myself you might say. I am a Nova Scotian. I have always been under the British flag.

Q. Have you ever commanded French ships?

A. No, sir.

Q. Do you know whether or not French ships are built on the [288] same plan, and according to the same type as British ships?

A. I don't know; I could not say for certain. I never went aboard to examine them. They are a little different on deck in equipment. They seem to carry more houses. I cannot tell anything about them.

Q. They are substantially different from the English ships generally speaking, are they not?

A. I could not say. I cannot say whether they are.

Q. Well, you just stated some differences that are usually found in French ships, which you do not find in British ships?

A. Some difference on the deck fixings but I do not know anything about the houses. I never built an iron ship and I don't know whether the hulls are the same or not.

Q. Do you know the French bark "Duc

(Testimony of Robert Gibson.)

d'Aumale"? A. No, sir, I do not know her at all.

Q. You have never seen her?

A. No, sir, I have never seen her.

Q. Do you know her dimensions?

A. No, sir, I don't know nothing about it. I have never seen her or heard anything about it. I don't know the ship's name now that we are talking of.

Q. Nevertheless you think you are capable of telling how she should be loaded?

A. I can tell pretty nearly by other ships, how she should be loaded.

Q. What do you mean by "pretty nearly"?

A. Anyone that has been to sea can tell that a cargo 600 or 700 tons in one lump is not right in loading a ship.

Q. That is your general idea?

A. That is my general idea.

Q. Suppose that lump of the heaviest cargo of the ship is [289] distributed over a large area, and that large area is the strongest part of your ship, would you not say that is proper stowage?

A. If it is taken fore and aft of the ship it should be good stowage. Where it is in one lump it is not good stowage.

Q. Would you say that you would put heavy cargo in the fore part of the hold?

A. You have to put it there to trim the ship. You would not put it on in one place. You have to put cargo there to trim the ship. If you put it in one place you have light cargo in the ends. There was no heavy cargo in the forward end or after end.

(Testimony of Robert Gibson.)

Q. Do you know where the 60 tons of pig iron in this case, were placed?

A. 60 tons in the between-decks.

Q. That was forward of the big pile in the bottom?

A. Yes, sir.

Q. Don't you think that was sufficient trim for the vessel?

A. I should think she ought to have had a little more in the between-decks. I think she had a little too much weight in the bottom.

Q. Captain, who would you say was better able to judge of the proper stowage, a man who has never seen that vessel and knows nothing about her, or a man who has had experience with her and has known how she behaved in the past?

A. A man that sails his own ship will know how she is trimmed and how she ought to be stowed better than a man who does not know the ship. Anyone who has been to sea will know that a ship is not stowed properly when her cargo is in one place. Anyone who is master of a ship will know that is not proper stowage, with that cargo in one place.

Q. No matter what kind of a ship she is? [290]

A. No matter what kind of a ship she is. It is too much weight in one place with a ship like that and the ends light.

Q. I want to be sure that you considered that question entirely independent of the type or the preparation of the ship, the cast of the ship, or the way she was constructed. These elements do not enter into it?

(Testimony of Robert Gibson.)

A. If the ship is made purposely to carry a weight in one place that is a different thing. An ordinary sailing ship, as she is supposed to be should not have so much weight in one spot, with only you might say light weight at the ends.

Q. You are speaking of the ordinary sailing ship with which you are familiar?

A. I guess French ships are not so much different from English ships in that way.

Q. You say you guess at that?

A. As far as I can see.

Q. Now, as far as the weather on the 28th of September was concerned, which has been described to you here, you remember that?

A. The 28th of September?

Q. The 28th of September? A. Yes, sir.

Q. You remember what that was?

A. That was when she was coming down the coast after she left.

Mr. CAMPBELL.—Q. The first gale after she left? A. Yes, sir.

Mr. HENGSTLER.—Q. Now, what was read to you referred to the weather, did it not?

A. The weather was not bad, I should not think. She had carried her upper top-sails all through; she had a southwest wind and the wind shifted to the northwest. Then she had a beam sea and commenced to roll. The wind got aft and they made more sail.
[291]

Q. Would you, from the description of the weather which you have read to you come to any conclusion

(Testimony of Robert Gibson.)

with respect to the condition of the sea?

A. The sea was from the southwest. The wind had been from the southwest for a day or two and shifted to the northwest, and that brought the wind aft on the sails, and she was going along with a side sea rolling.

Q. You would say, according to your opinion, she was rolling heavily on the 28th of September?

A. I don't know whether she was rolling heavily. I cannot tell.

Q. She was rolling? A. Any ship will roll.

Q. You cannot tell me the wind that blew or the weather that prevailed at that time. You cannot tell whether she was rolling heavily or not?

A. She might have been rolling heavily; I cannot tell. Any ship will roll when she gets a beam sea. Some will roll heavier than others, according to the way they are trimmed. I think she would roll heavily because she had so much weight in her bottom right in one spot.

Q. Is the rolling of a ship dependent entirely on the wind that is prevailing at the time?

A. Yes, sir, considerably. If you have the wind aft besides a beam sea on, she is going to roll. If you have a side wind your sails are in the wind, and you steady your ship from rolling. You have to carry sails to do so.

Q. When you said in answer to a question of Mr. Campbell, that on September 28th the usual sea prevailed, you meant, did you not, the usual weather, the weather that may be expected at that time?

(Testimony of Robert Gibson.)

A. In the Atlantic you always expect something of that kind and expect a sea. Any sort of a ship will stand a bit of a sea where she is carrying upper top-sails. She may have some water on deck. That is a natural thing in an iron [292] ship loaded.

Q. You have no opinion as to what kind of a sea was on, on September 28th?

A. From what was read there must have been a sea on or some sort of a swell on when they had the wind from the southwest a couple of days—a day and night.

Q. With the same wind is there always the same sea?

A. The sea is made by the wind. The wind blows up the sea. If the wind is from one quarter for 24 hours you will get a sea. After the wind shifts you still have that sea until it goes down.

Q. Don't you know that there may be an exceedingly heavy sea even though there is no wind at all?

A. There is a sea that rolls in from where there has been a wind. There has been a wind somewhere to make that sea.

Q. Even although there is no wind at the particular time, there may be a very heavy sea?

A. Yes, sir.

Q. In that very heavy sea a vessel would roll heavily?

A. She may; that is according to the way she is loaded. If she is loaded right she will not roll heavily.

Q. Is it not according as there is a heavy sea or

(Testimony of Robert Gibson.)

smooth sea as to the way she rolls?

A. A ship will roll in a heavy sea, but she will not roll so much in a smooth sea.

Mr. HENGSTLER.—I think, if your Honor please, that is a very easy question for the witness to answer.

The COURT.—He does not understand the question. Repeat the question.

Mr. CAMPBELL.—Ask the question again. Read the question, Mr. Reporter.

(The reporter reads the question.) [293]

A. Yes, sir; she will roll in a heavy sea.

Mr. HENGSTLER.—Q. She will roll more in a heavy sea than in a smooth sea, will she not?

A. Certainly.

Q. So that the amount of rolling depends upon the condition of the sea, does it not?

A. Yes, sir, and according to the way a ship is loaded. A ship will roll heavier when—

Mr. HENGSTLER.—I move to strike out all of these volunteer answers, if your Honor please.

Mr. CAMPBELL.—Let him finish his answer.

Mr. HENGSTLER.—I want him to answer my question.

The COURT.—He has answered it.

Mr. HENGSTLER.—I do not ask anything about the loading at all. I move that that portion be stricken out, about the loading.

The COURT.—Strike it out.

Mr. HENGSTLER.—Q. You state that the amount of the rolling depends upon the condition of

(Testimony of Robert Gibson.)

the sea, does it not? A. Yes, sir.

Q. And the condition of the sea does not depend on the wind alone, does it?

A. No, sir; I suppose not.

The COURT.—You mean the wind blowing, that is blowing at the particular time?

Mr. HENGSTLER.—Yes.

Q. There may be a very heavy sea even although there is dead calm?

A. Yes, sir; dead calm, and the ship will roll.

Q. If she rolls she strains, does she not?

A. I don't know. An ordinary ship, a well balanced ship, will not strain when there is no heavy sea and when she is not rolling so badly. A good ship ought not to strain when rolling.

Q. A good ship does not strain when she rolls?

A. No, sir. [294]

Q. Does not every ship strain when she rolls?

A. I don't think that they do.

Q. Would you say that a ship strains if she is lying in a smooth bay at anchor?

A. She ought not to strain any.

Q. Is there any strain on her when she is lying down here at anchor, do you know?

A. I don't know how you mean. When there is no strain and nothing to hurt the ship?

Q. I asked you whether there is a strain on the hull when she is lying in a smooth bay?

A. I don't think there is any strain.

Q. Don't you know that the different parts of the ship are built of different strengths, one part being

(Testimony of Robert Gibson.)

very strong and the other part lightly built? Don't you know that?

A. That a ship is differently built?

Q. Different portions of a ship are not built equally strong?

A. I suppose they are built according to the way they have to carry their cargo. They don't carry the cargo in the bows or stern. They put it in the strongest part of the vessel.

Q. There is the stronger part and the weaker part of a vessel? A. I suppose so.

Q. Then there would be a strain on some part?

A. I don't think there is any strain on a ship out here in the bay.

Q. Not when rolling? A. No, sir.

Q. Suppose she rolls quite as heavily is there still no strain on her?

A. I don't know. I expect there may be, but I cannot tell.

Q. You stated, I believe, that in your experience as a Master you have loaded pig iron? [295]

A. I have carried a full cargo of pig iron from Androssin to New York, in a wooden ship.

Q. With nothing else in? A. Nothing else.

Q. Was that the only time that you carried pig iron?

A. I suppose I have had pig iron in, 50 or 100 tons, I cannot say when because we loaded a general cargo at Antwerp. We get glass, cement and we may get pig iron.

Q. Answer my question?

(Testimony of Robert Gibson.)

A. I cannot tell any more than that.

Q. Answer my question.

A. I am answering it as nearly as I can.

Q. It is not necessary to go into other things.

On those occasions when you loaded at Antwerp, you carried pig iron just as ballast?

A. Not as ballast, no, sir. I never carried any cargo as ballast. I generally had a full cargo.

Q. You say you might have had pig iron?

A. I might have. It is so long since I loaded it that I don't remember.

Q. You do not know whether you loaded pig iron or not? A. I cannot say for certain.

Q. Did you ever carry coke?

A. I remember carrying coke—not a full cargo. I have had 200 or 300 tons of coke in the ends of the ship.

Q. In a comparatively small space in the ship?

A. In a space in the ship that they wanted to fill in and they filled it up with coke.

Q. What was the rest of the ship's cargo when you carried coke in the ends of the ship filled with? What was the rest of the cargo?

A. I started to tell you that a few moments ago. I carried all sorts of cargo, glass, cement and different things,—an Antwerp general cargo.

Q. And the coke was in the ends? [296]

A. Some coke as well as something else in the ends. Some of it may have been amidships.

Q. But as far as you remember, most of it was at the ends?

(Testimony of Robert Gibson.)

A. There was some part in different places; I had coke many times.

Q. You mean to say that the coke was distributed all over the general cargo?

A. Yes, sir. You put coke over a thin cargo.

Q. You do?

A. Yes, sir; coke is filled in.

Q. Don't you know that one of the first rules of stowage in connection with coke is, that it must never come in connection with general stowage?

A. You can separate it. It is always boarded between.

Q. Is that not the reason you put it in the ends and bulkhead it over?

A. It is bulkheaded, and even you put old cans underneath.

Q. Coke is light cargo, is it not

A. Yes, sir. I think coke is a nice cargo.

Q. Is not that the reason, because it is light—one of the reasons—that if you carry it in a ship you carry it in the extremities of the ship because the extremities can stand it, because it is the weakest part of the ship?

A. It is not. It is because the ship is getting too deep down to her marks in the water, and they fill the space up with coke.

Q. Would you consider it good stowage to put pig iron in the stern of the ship?

A. Not in the stern of the ship, no; not right in the stern, but you have to distribute perhaps 20 or 30 feet away from the stern of the ship some of it, and in dif-

(Testimony of Robert Gibson.)

ferent places. You distribute it along the bottom of the ship.

Q. Is not the reason why you do not put pig iron in the stern, [297] that the stern is too weak to carry that cargo?

A. She will not carry much there. The ship is sharp and she goes down in the sea.

Q. Is that the only reason why you do not carry pig iron?

A. There are different reasons. You would not carry it because you cannot carry much coke on account of putting the ship down too deep in the water.

Q. Is that the only reason? A. I don't know.

Q. Have you ever, in all your experience as a sea-captain, known of heavy cargo being put in the ends of a ship? Is it not a plain, ordinary rule of stowage not to put heavy cargo in the ends of the ship?

A. Not in the ends. You do not put heavy cargo in the ends of a ship, that is, the pig iron. It does not go in the ends of a ship. It goes quite a piece away from the ends of the ship?

Redirect Examination.

Mr. CAMPBELL.—Q. Captain, what does the comparative severity of the rolling of a ship at sea depend upon?

A. What does the rolling depend upon?

Q. Yes, the amount that a ship will roll in a given sea. What would that depend on?

A. As affects a roll; it would depend on the way she is loaded.

(Testimony of Robert Gibson.)

Q. In what respect does the way she is loaded affect it?

A. If she has too much weight in her bottom she will roll very quick. If it is distributed rightly she will roll easily.

Q. When she has too much in her bottom and rolls quickly, what do you call a ship so loaded?

A. She is apt to strain.

Q. What do you call that trim of the ship?

A. She is not well loaded. [298]

Q. What do you call it from your nautical experience?

A. I forget now. She is not trimmed right or something or other.

Q. On the 28th or 29th of September, during that wind, the log shows that the ship was on a course south 35 degrees west, and the wind shifted from the southwest to the northwest. What kind of wind did she have when it shifted to the northwest?

A. She had the wind southwest before, and it shifted at 8 points to the northwest.

Q. After it shifted, did she have the wind aft or how? A. She had it aft.

Q. In your judgment, would a ship strain more or less when she is running before the wind and before the sea, or running into it?

A. She would strain more when she is running into it.

Q. If you had a vessel that was leaking at the butt ends, would you expect her to leak more when she was

(Testimony of Robert Gibson.)

running into a sea or when she was running before the sea?

A. When she was running into a sea.

Q. Why?

A. Because it strains her more. Driving a ship into a head sea it will strain her more than running with the sea.

Recross-examination.

Mr. HENGSTLER.—Q. You said that rolling depends on the way she is loaded. You mean the way she is loaded is one of the causes of rolling, don't you? You do not mean that it is the only cause of rolling, do you?

A. It is not the only cause of rolling. The sea is one cause and the way she is loaded is another—the way she rolls.

Q. The sea has a good deal to do with it?

A. Yes, sir. [299]

(It is stipulated between the proctors that the Court in passing on the question of liability may consider that this cargo received the character of damage as alleged in the libel, and that after the question of liability is determined the case may be referred to the Commissioner for the purpose of determining the amount of damage.)

Mr. HENGSTLER.—If the Court please, if scientific testimony is going to be offered here with reference to the strain upon the hull of this vessel due to the particular stowage which was used in this case, that will make it necessary for me, I think, to take the depositions of the builders of this vessel who are

(Testimony of Robert Gibson.)

the best judges on that particular question. Nevertheless, I am willing to submit the case to the Court in so far as we can at the present time, and to argue the legal points while your Honor is here. I will ask your Honor in that event to give me time to take the necessary depositions in Europe of these builders before your Honor decides the case, taking it into consideration, at the same time supplementing our oral argument with what argument may be necessary on account of those depositions.

Mr. CAMPBELL.—That is asking me to go a long ways, if your Honor please. They have taken depositions in Europe of the surveyors who surveyed this vessel and loaded the vessel immediately prior to her departure. To ask that the case be suspended until they can get the builders' depositions when they were fully advised of the character of stowage, and the character of defense, is going a long ways.

Mr. HENGSTLER.—This is not a question of stowage. It is a question of the structure of the ship.
[300]

The COURT.—It would probably be better to postpone this matter then until the testimony is in.

Mr. CAMPBELL.—I am willing that that should be done if counsel understood my stipulation that way. I will give him that freedom. I will stand by my stipulation. I do not want to have any misunderstanding with Dr. Hengstler about this. What I thought he had in mind was that he might want to call someone in answer to the shipmasters. That I am willing to do, but to go back to the builders of the

(Testimony of Robert Gibson.)

vessel and take their depositions is a different thing.

Mr. HENGSTLER.—They are the only real judges with reference to the stowage of the ship in connection with the particular type of the hull.

Mr. CAMPBELL.—Her type is the ordinary type of a French sailing vessel. Dozen of her type come in every year.

Mr. HENGSTLER.—I will waive any depositions in regard to the testimony that has been heard to-day. I do not want any depositions with regard to that, but if Mr. Dickie goes on the stand with his scientific curves and stresses and things of that nature I want testimony to rebut him.

Mr. CAMPBELL.—We will call Mr. Dickie to-morrow.

The COURT.—We will see what his testimony is, to-morrow.

Mr. CAMPBELL.—I will limit his testimony as much as I can. We have not in our possession sufficient data—Mr. Dickie may correct me if I am wrong—to enable us to say there were so many tons of strain exerted on this vessel. I want to show the character of the strain that this kind of stowage produced on the vessel.

The COURT.—Not on this particular vessel?
[301]

Mr. CAMPBELL.—On this type of vessel. I may say this: It is a scientific explanation of the same kind of strain that Captain Curtis described, practically.

Mr. HENGSTLER.—If I can get along with him,

(Testimony of Robert Gibson.)

all right. If I know enough to cross-examine this witness intelligently I will not take up the time.

(An adjournment was here taken until to-morrow, Wednesday, January 17th, 1912, at 10 A. M.) [302]

Wednesday, January 17th, 1912.

Testimony of Albert F. Pillsbury, for Libelants.

ALBERT F. PILLSBURY, called for the libelants, sworn:

Mr. CAMPBELL.—Q. Captain, what is your business?

A. Marine Surveyor; Surveyor for the Board of Marine Underwriters in San Francisco.

Q. Who comprise the members of the Board of Marine Underwriters in San Francisco?

A. Most of the Marine Underwriters doing business in San Francisco.

Q. Do you hold a shipmaster's license?

A. Yes, sir.

Q. For what character of vessel?

A. Unlimited steam and sail.

Q. What was the last command that you had?

A. The "City of Pekin."

Q. The Pacific Mail boat? A. Yes, sir.

Q. Running to the Orient? A. Yes.

Q. How long have you been surveying?

A. Nine years.

Q. In this port? A. Yes, sir.

Q. What class of vessels have you surveyed?

A. All classes.

Q. Have you ever had an opportunity of examin-

(Testimony of Albert F. Pillsbury.)

ing any of these French sailing vessels that come in here? A. Yes, sir.

Q. I will ask you to state whether or not they are all more or less of the same general type—the French vessels themselves?

A. On the whole, I would say so.

Q. Have you ever had any occasion to survey any of the British sailing vessels, three-masted and four-masted barks which come into this port? A. Yes.

Q. I will ask you to state whether or not there is any material difference in the construction and in the mould of the hull and in the rigging in the French ships and barks and the English [303] ships and barks?

A. Not in those that were built at about the same period.

Q. Well, if they do differ, in what respect is it, Captain?

A. The older sailing ships were iron; those that were built prior to 1895; since then most all ships, steam and sail, are built of steel.

Q. But so far as the mould of the hull is concerned, and the rigging of the vessel, is there any difference between the English and the French vessels?

A. No material difference. Some English vessels are built wider than others and some French vessels are built wider than others. Some are built with a little different coefficient, that is, a little coefficient, in both English and French vessels. In the general design there is no difference.

Q. Did you have any occasion to survey the cargo

(Testimony of Albert F. Pillsbury.)

of the "Duc d'Aumale" when she arrived here?

A. I did.

Q. Where did you find the pig iron stowed?

A. According to my recollection there were about 660 tons in the cargo; 60 tons of that were stowed in the between-decks, about 30 tons on each side; and a block of about 300 tons abaft of the main mast; some 110 tons or 120 tons in the lower hold, forward of the main hatch, and the balance, some 180 or 190 tons, which would make up the 600 in the lower hold, abaft of the after-hatch and extending from that point out to the bulkhead aft; that is, extending from the hatch to the bulkhead aft. Of course, you understand that I am speaking of the lower hold. [304]

Cross-examination.

Mr. HENGSTLER.—Q. You are the surveyor for the underwriters here, are you not, the official surveyor?

A. Yes, for the Board of Marine Underwriters.

Q. Did you examine the cargo of this ship "Duc d'Aumale" when she arrived in this port, for the underwriters of the cargo?

A. I cannot say whether I did or not. I examined the stowage of the vessel at the request of Meyer, Wilson & Company, who were the importers of the cargo.

Q. Do you know who the underwriters of the cargo are in this case?

A. It is my impression that it is the Hamburg Underwriters.

Q. Did not Meyer, Wilson & Co. depute you to ex-

(Testimony of Albert F. Pillsbury.)

amine the stowage of that vessel in behalf of the Hamburg Underwriters, for the Hamburg Underwriters? A. That may be.

Q. You do not mean to say that all French vessels are built on the same type? You qualify that by saying "more or less"? A. Yes.

Q. There is a difference in their fineness of build; some of them are built broader and some of them—

A. (Intg.) I have already said that some of them have a finer coefficient than others.

Q. You say that on the whole, speaking broadly and approximately, there is no great difference in the mould of the French vessels from that of the English vessels; is that the idea? A. Yes, sir.

Q. Which class of vessels is more strongly built in your opinion, generally speaking, the British ship or the French ship, of similar type?

A. What do you mean to ask for, the workmanship or the design? [305]

Q. The structure.

A. I think the British ships as a whole perhaps are of stronger design than the French.

Q. Are not French ships, generally speaking, finer in their design in the extremities than the British ships—generally speaking, I say; I know there are individual differences always.

A. Do you mean to ask me that question?

Q. Are not the French ships generally built finer in their designs, particularly in the extremities, than British ships?

A. Well, there are different classes of both nation-

(Testimony of Albert F. Pillsbury.)

alities. Some owners will start out with a certain block coefficient which is finer than others.

Q. Do you remember about this particular ship, the "Duc d'Aumale," whether or not her stern is finely built?

A. I do not remember exactly; it is my impression that it is.

Redirect Examination.

Mr. CAMPBELL.—Q. Just one matter that I forgot to ask you about. I wish you would take this piece of paper and show us how the butts or how the plates on the bottom and sides of steel vessels are butted, that is, when the butting plates are not overlapping plates?

Mr. HENGSTLER.—In steel vessels?

Mr. CAMPBELL.—Yes.

Q. Are you familiar with the way the French vessels are fitted?

A. To some extent; yes.

Q. Where plates are butting plates and not lapping plates, are they butted the same in practically all vessels?

A. Well, a plate—a butted plate would be the same, yes.

Q. Just mark that with the figure "1." What does figure one represent?

A. A butted butt, looking from the outside.

Q. What is the space between the two ends, which space is marked with a pencil "A"? [306]

A. Well, that is usually calked.

Q. What is that space? A. That is the butt.

(Testimony of Albert F. Pillsbury.)

Q. Is the space between what?

A. Two plates.

Q. Is there anything put behind the ends of those two plates, beneath this space?

A. Sometimes a small piece of metal; other times simply a calking-tool, placed together and they calk that and make it tight.

Q. But on the inside of the plating is there anything put behind and across the two ends?

A. A butt-strap.

Q. That is indicated in the figure marked "2"?

A. Yes, sir.

Q. Into this space between the ends of the two plates what is put for the purpose of calking or tightening?

A. Usually a piece of metal is calked in there.

Q. Have you read the survey reports of the repairs that were made at Buenos Ayres on the bottom of this vessel?

A. I have, but it is some time ago.

Q. If those survey reports refer to butts being calked by the insertion of a piece of steel, where would that steel be inserted?

A. It would be on the outside at this point here (indicating).

Q. In the parlance of the sea, what is that called, inserting that steel plate?

A. The caulking; sometimes it is called a Dutchman.

Q. Will you state whether or not the insertion and calking of a Dutchman in the space between the ends

(Testimony of Albert F. Pillsbury.)

of the plates is the usual and customary manner of calking and tightening the butt ends?

A. Yes, sir.

Mr. CAMPBELL.—I will offer this in evidence.

[307]

(The paper was here marked Libelants' Exhibit "D.")

Recross-examination.

Mr. HENGSTLER.—Q. You say this is the general way of butting plates?

A. It was; it is not in use any more.

Q. It is not in use any more? A. No, sir.

Q. Do you know whether that is the way in which the plates of the "Duc d'Aumale" were butted?

A. Yes, sir.

Q. How do you know that, Captain?

A. I saw some of them.

Q. You saw some of them? A. Yes, sir.

Q. Do you know whether they were all butted in that way?

A. No, I do not because some of the vessels are partly butted and others are lapped.

Q. Did you see those simply accidentally while you were looking at the stowage?

A. I could not see the outside butts because they would be under water—not many of them; there would only be some at the light line.

Q. You did not see any of the outside butts on the "Duc d'Aumale"?

A. I could not see any that were below the light water line because the vessel was not docked.

(Testimony of Albert F. Pillsbury.)

Q. How many did you see on the inside?

A. I do not remember.

Q. Did you see any on the inside?

A. I saw some straps.

Q. You say some straps? A. Yes, sir.

Q. In what portion of the ship were those?

A. I could not tell you now exactly; around the bilges, according to my impression.

Q. You did not examine them, did you, Captain?

A. No.

Q. You did not look at them with any particular object or with any particular care, did you?

A. I could not see them at that time. The only way to make [308] the examination would be on the dock.

Q. You just happened casually to some of those, did you, and not accurately?

A. In a general way I looked at them.

Q. When the repair that Mr. Campbell spoke about was made in Buenos Ayres, on one of those butts, you do not know what the damage to it was owing to, do you, Captain, what the cause of the damage to those butts or plates was? You don't know that, do you? A. I have an opinion.

Q. But you do not know, it, do you?

A. Not from my own observation.

Q. Could not that be caused by a great many different causes?

A. It could be caused by two or three causes.

Q. Could it be caused by the vessel going on the strand and these plates and butts being bent and in-

(Testimony of Albert F. Pillsbury.)

jured thereby? Could that be one of the causes?

A. It could be, with the vessel hung up on both ends and if it was not supported while over.

Further Redirect Examination.

Mr. CAMPBELL.—Q. Now, Captain, since Mr. Hengstler has seen fit to go into that question, what else could it be caused by?

A. You mean the reasons for the open butts?

A. Well, it would be my opinion, in the first place—

Mr. HENGSTLER.—Q. Captain, he did not ask you that; he said what else could it be caused by besides the cause you have stated.

A. It could be caused by improper distribution of weight in the vessel.

Mr. CAMPBELL.—Q. What would follow from the improper distribution of the weight?

A. Of course, when the vessel would be at sea—

Mr. HENGSTLER.—He said that that damage would follow; he [309] has testified to that.

Mr. CAMPBELL.—Mr. Hengstler, you are not testifying; the witness is testifying and you are not.

Q. What would follow from the improper distribution of weight?

A. Well, you see the vessel would labor and roll heavily.

Q. What effect would that have on the structure?

A. That would strain the structure.

Further Recross-examination.

Mr. HENGSTLER.—Q. Captain, could not that damage be due also to the fact that the vessel met

(Testimony of Albert F. Pillsbury.)

very high waves? A. It could be, yes.

Q. Or if she meets very long waves that would have the same effect, would it not, Captain?

A. Not very long ones; no.

Q. Would not very long waves strain the vessel, no matter how she is loaded?

A. It is not so likely as by very high and very short ones.

Q. But it is true that long waves would have the same effect to a lesser degree, would they not?

A. Yes, I think quite a lesser degree.

Mr. CAMPBELL.—Q. Do you know whether the “Duc d’Aumale” was of the same general type, except her rigging, as the British ship “Chateau Briand”?

A. Well, the “Chateau Briand” has considerable more beam and not as fine lines perhaps. [310]

Testimony of David W. Dickie, for Libelants.

DAVID W. DICKIE, called for the libelants, sworn.

Mr. CAMPBELL.—Q. What is your business, Mr. Dickie?

A. I am a Naval Architect and Engineer.

Q. Will you kindly state what experience you have had as a Naval Engineer and Architect and what training you have had?

A. I served four years in the joiner-shop, boat-shop, carpenter-shop and steel shipbuilding-shops at the Union Iron Works; two years and some odd months in the drawing-room following that.

(Testimony of David W. Dickie.)

Studied Naval Architecture under my father at night.

Q. Who is your father?

A. James Dickie, manager of the shipyard of the Union Iron Works. Passed the examination for a Government draughtsman and was employed in the Government service for one year, in the Naval Constructor's office at the Union Iron Works. Passed the examination for Chief Draughtsman, and was assigned to the Naval Constructor's office at Seattle in charge of the United States Battleship "Nebraska." After that I was two years in Scotland at the Glasgow University. In the meantime, in the vacations, working at the Clyde Bank Shipbuilding Company on the Atlantic liners "Coronia," and "Carmania," and just at that time they were beginning the plans of the "Lusitania" in the drawing-room. Visited, under the auspices of the Glasgow University Engineering Society, the various shipyards throughout Great Britain and Germany, and on a trip through Europe visited French and Italian shipyards. Returning to America I worked in the Newport News Shipbuilding and Drydock Company's establishment, in their drawing-room and in the estimating department; and again at the Fore River Shipbuilding Company at Quincy, Massachusetts; Assistant Engineer of works at the National Cash *Regist.* [311] Came west and joined my father again in business in 1906, and joined my brother in 1907, the three of us being in the office together now.

(Testimony of David W. Dickie.)

Q. In what business?

A. Engineering and naval architecture. A member of the Society of Naval Architects and Marine Engineers; a member of the Engineers Shipbuilders of Scotland; a member of the Pacific Northwest Society of Engineers; a life member of the Glasgow University Engineering Society.

Q. Are you in a position, Mr. Dickie, to tell us the nature of the strain which would be produced upon the hull of the *British* bark "Duc d'Aumale" where she was loaded with 2,660 tons of coke and pig iron, of which 1,900 tons were in the lower hold and 760 tons in the between-decks; and of the 1,900 tons in the lower hold 600 tons were pig iron, and of the 760 tons in the between-decks, 60 tons were pig iron. The 600 tons of pig iron in the lower hold were stowed in one body athwartship the vessel, immediately abaft of the square of the main hatch, for a distance of 63 feet, and at its forward end it is 26 feet in width and at its after end it was 23 feet in width. Can you tell us the character and the nature of the strain which would be produced upon the hull of that vessel by stowage of that cargo in that manner?

A. I have made some calculations which will enable me to explain the stresses on the ship due to such loading.

Q. My question is, can you do it? A. Yes.

Q. We would like to have your explanation as to the character of the strain which would be produced from those circumstances on the hull of the vessel?

A. I have made some notes here, if I can refer to

(Testimony of David W. Dickie.)

them, and I would like to have the blackboard and a piece of chalk. [312] With the permission of the Court and of counsel I would like to eliminate all the calculations and figures and just give the illustrations. In investigating this problem I tried different calculations to find the reason for the damage showing at the places it did. It is a known fact that excessive stiffness—

Q. (Intg.) Mr. Dickie, I am not asking you for that. I am not asking you to go into the question of the damage to this vessel. I am asking you if you can show us the character of the strain that was produced on the hull of that vessel by the loading. I do not want to ask you about the damage. That will be taken care of in another way.

A. It is a known fact that excessive stiffness of a ship will, by means of the strain resulting from the couple formed by the rigging pulling down and the mast resisting in an upward direction, produce a stress on a ship's bottom that will cause the vessel to develop trouble in the form of leaky butts and loose riveting in the wake of the masts. The ordinary ship—

Q. Mr. Dickie, I do not want you to go into the question of damage to the vessel. You are going into the question of the damage to the vessel. I want to limit your examination as much as possible.

A. Do you want to know how I arrived at this result?

Q. I want to know, if you can tell us, the character of the strain, if there was any strain, that was pro-

(Testimony of David W. Dickie.)

duced upon the bottom of this vessel by the stowage of this cargo in that manner.

A. Oh, I misunderstood you. The character of the strain, as illustrated by this curve, was in the nature of a sheering force; for example, on page 43 of Walton's book on "Know Your Own Ship," he illustrates— [313]

Mr. HENGSTLER.—I submit that the witness is not testifying here as to the character of the strain.

Mr. CAMPBELL.—Well, just wait until he finishes his answer, Mr. Hengstler, and if it is improper I will consent to having it stricken out.

A. (Continuing.) On page 41 of Walton's "Know Your Own Ship" he illustrates the strains on a vessel floating light. He shows there—

Mr. CAMPBELL.—Wait until I show that book to his Honor.

A. (Continuing.) He illustrates the strains on a ship floating light. If you put a heavy weight in one part of the ship and the weight exceeds the buoyancy of the ship at that point, that produces a sheering force at the end of the weight. If you have a part of the ship where the buoyancy exceeds the weight, that buoyancy tends to lift that part of the ship and produces an equal and opposite sheering force at the same point. These two sheering forces are equal. This sheering force is represented by this curve which I have drawn here.

Mr. HENGSTLER.—Q. Which sheering force—you spoke of two?

A. Both sheering forces; they are equal and op-

(Testimony of David W. Dickie.)

posite. They are represented by this curve. Now, the way that this is arrived at, I take a straight line and put upon it the weight first of the ship, which is represented by this line here (showing).

Mr. CAMPBELL.—Q. What is that line marked as? Mark it with some identifying mark.

A. That is the weight of the ship.

Q. Mark the line so that the record will show it; mark the line A B.

A. I will mark it "Weight of Ship"; that is the weight of the [314] ship. Now, on top of that I superimpose the weight of the coke, which is 1,990 tons; that is represented by this line. I will mark that "Weight of Coke." On top of that again, I superimpose the weight of the pig iron, 600 tons, which is represented by this line. I will mark that, "Weight of Pig Iron." The other 60 tons of pig iron I stowed here as indicated on the stowage plan. So that this area in this figure represents the weight of the pig iron. Then as a matter of convenience only I stowed the weight of the masts up in their proper place as they come on the ship.

Q. Those are indicated by the three perpendicular shaded sections?

A. Yes, up here. Obviously this curve now represents the total weight of the ship.

Q. Which curve?

A. This total curve beginning here and running up over the masts, because I have stowed in there the total weight of everything that is aboard the ship.

(Testimony of David W. Dickie.)

Q. That is the outside boundary line of the drawing?

A. Yes. Now, I superimpose on top of the curve the supporting forces which are represented by Mr. Walton in his book, the supporting forces of the ship, or the buoyancy of the ship, the thing that carries it; that is formed by this line.

Q. Mark that buoyancy line?

A. Yes, buoyancy line. You can see now by looking in here that the buoyancy exceeds the weight and that up here the weight exceeds the buoyancy.

Q. That is to say, on the righthand side of your drawing the space between the line marked "Weight of Coke" and the buoyancy line represents in area the amount of excess buoyancy there was in the fore part of the ship of the type of the "Duc d'Aumale"?

A. Yes, and the after end represents where the weight exceeded the buoyancy. [315]

Q. Between what lines is that section shown?

A. Between the weight of the pig iron and the mastline and the buoyancy line. Now, in order to clear my diagram and produce the other curve I have brought all these weights down. This thickly shaded part represents the difference between the weight and the buoyancy.

Q. Mark this section you are speaking of now.

A. The part above the line represents excess of buoyancy; the part below the line represents excess of weight. Now, here we have an excess of buoyancy; and here at the end of the ship we have an excess of weight. The stores are at this end, and the

(Testimony of David W. Dickie.)

anchors and the chains and all that sort of thing are at this end. From that we integrate that curve. It is done with an Amsler's Integrator and we get the sheering force curve. I have described the sheering force curve in my notes here. A sheering force is a force that is aroused by one part of the ship wishing to slide past another part, due to an excess of buoyancy or to an excess of weight. The peaks of the curves—that is, the top and the bottom part—show the places of extreme sheering force, their location above or below the base-line being merely for mathematical reasons and they all could be put above; this peak could be put here just as well as not, if it were so desired. Note that every place where the sheering force curve reaches away from the base-line is described in the reports of the surveyors as the place where trouble occurred.

Mr. CAMPBELL.—Well, your Honor, that part we will ask to have stricken out because I do not wish the witness to go into the question of damages at all.

Q. From your calculations, Mr. Dickie, what conclusion have [316] you arrived at, if any, as to the straining effect, if any, of this stowage of cargo upon the hull of this vessel?

A. This stowage of the cargo on the hull of the vessel, that is to say, stowing the 600 tons of pig iron aft, with the comparatively light cargo of coke forward, produced an excessive strain on the vessel in the region of the mizzen mast and in the region of the main mast, with a slight excessive strain in the

(Testimony of David W. Dickie.)

region of the fore mast.

Q. According to what method have you calculated these strains?

A. These have been calculated assuming that the ship was floating in still water, and all the strains due to the ship being at sea have to be added to this. There is an additional strain of from 34 to 65 tons for each mast that has to be added to these forces on account of the resultant pressure of the masts on the keel, due to the pulling strain of the rigging while the ship is at sea.

Q. That would be present in any ship, would it not?

A. Yes, that would be present in any ship, and that is taken care of in the design.

Mr. CAMPBELL.—We will disregard that, your Honor, and that portion of it we will ask to have stricken out.

Mr. HENGSTLER.—Q. That strain would not be exercised upon the same places, upon the same parts of the ship, as the strain from the stowage acts?

A. No, but it so happens in this case.

Q. In other words, it could not be added on to the strain in this case?

A. You would have to add it on where it properly belonged. It so happened that the stowage in this case accentuated the strain which came at the masts. That was merely a coincidence however. [317]

Mr. CAMPBELL.—Q. Why was that?

A. Because this end of this stowage came just forward of the main mast and the end of this stow-

(Testimony of David W. Dickie.)

age came just forward of the mizzen mast.

Q. What represents upon your drawing the sheering force?

A. This dark pencil line represents the sheering force.

Q. And it runs up and down the horizontal line of the center?

A. Yes, this horizontal line is the base line.

Q. From your calculations, where did you find the greatest sheering forces to exist?

A. The greatest sheering forces existed in two places: one just at the end of the pig iron, or just at the after end of the main hatch, between the after end of the main hatch and the main mast; the other one was just forward of the mizzen mast.

Q. Where were those two points with respect to the ends of the pile of 600 tons of pig iron?

A. Right at the end of the pile.

Q. Is this calculation of yours made in accordance with any scientific principles of ship designing?

A. Yes, it involves the very principle on which we design ships.

Q. In designing ships are you able to calculate the weight of the cargo which they will carry for distribution of those weights? A. Yes.

Q. In the designing of ships is such calculation necessary in order that you may know what strength of materials to put into particular parts of a vessel and to know what mould to give the vessel so as to give her water line and her load line properly?

A. Yes, sir. [318]

(Testimony of David W. Dickie.)

Q. If this pig iron had been distributed more over the bottom of this vessel, what effect would that have had upon the sheering force?

A. If this pig iron had been distributed so that there was a pile put between these two masts and a pile between those two masts and—

Q. (Intg.) Just state what you mean when you say “between these two masts.”

A. If this pig iron was distributed so that there was a pile put between the fore mast and the main mast, and another pile put between the main mast and the mizzen mast the effect would be to reduce the height of the sheering force curve and bring it down in this form, so that it would very materially lessen the strain on the ship, or very materially lessen the sheering force on the ship and the strains attendant thereto.

Q. State whether or not, in your judgment, as a naval architect, the sheering force which you found to exist by the distribution of this cargo in the “Duc d’Aumale” was an unusually destructive one upon the hull of the vessel.

A. Yes; it appealed to me as being careless loading.

Mr. CAMPBELL.—I do not think I will go into the technical part of this any more, Mr. Hengstler, unless you want to. My idea, if the Court please, was simply to get before us a scientific idea of the nature of the strain that would be produced by that loading.

(Testimony of David W. Dickie.)

The COURT.—We can get some idea of the scientific end of it by the explanation made by Captain Curtis; he said that if you float a lath on water and put the weight on the ends the center would naturally sink down.

Mr. CAMPBELL.—Yes, in his nautical way he described it as Mr. Dickie has, in a scientific way. I do not care to have [319] him go into the quantity of the forces, and the like of that. I think that is all.

Mr. HENGSTLER.—I will admit, your Honor, that there are a great many features of this that I am unable to understand, the so-called scientific part of it.

Cross-examination.

Mr. HENGSTLER.—Q. Mr. Dickie, there are a good many data to be considered, are there not, in making this curve of stress that you have made in this case? A. Yes, sir.

Q. A great many features?

A. Yes—well, not a great many; I have them noted in my report here.

Q. Among those features is the weight of the ship?

A. Yes, sir.

Q. What was the weight of this ship?

A. The weight of this ship was about 1,285 tons, without the masts, and the masts' weight, about 155 tons.

Q. Where did you get these data?

A. I took that from ships of the "Duc d'Aumale" type. I took that from informaion upon which

(Testimony of David W. Dickie.)

ships of the "Duc d'Aumale" type are designed.

Q. Different ships of that same type have different weights, have they not?

A. No, they weigh about the same.

Q. You say they weigh about the same?

A. Yes.

Q. But you do not mean to say they weigh the same, do you? A. Within 2 or 3 per cent, yes.

Q. How do you know that?

A. Because they all float about the same depth.

Q. How do you know that? Are you familiar with that type of French ships?

A. Yes. That type of French ship is taken from the British designs; in fact, most of these French ships, the [320] drawings have been traced right directly from the British designs that have been taken over there by these young men who went over there to build ships for the French bounties.

Q. You have read about that, have you, Mr. Dickie?

A. No, I know some of the men who went over there.

Q. Do you mean to say that you actually know that the "Duc d'Aumale" has been actually built upon the designs of British ships?

A. I could not make that positive statement that the "Duc d'Aumale" was, but the "Duc d'Aumale" was built by men who went over with British designs. She was built at the same time that other ships were built from British designs. In fact, I know it to be a fact that the "Chateaux Briand" was taken di-

(Testimony of David W. Dickie.)

rectly from a British design because the plans—

Q. (Intg.) I do not care about the “Chateaux Briand”; the “Chateaux Briand” is not in suit here; I am speaking of the “Duc d’Aumale”?

A. I did not see the plans of the “Duc d’Aumale.”

Q. You did not see the plans of the “Duc d’Aumale”?

A. No.

Q. The only thing that you know about the weight of the “Duc d’Aumale” is that you know the weight of other French ships of the same type?

A. Of the same type, yes, sir.

Q. What is the length of the “Duc d’Aumale”?

A. She is 277.7 feet on the main deck and about 266.2 feet on what we call between perpendiculars.

Q. Who told you that?

A. I took that from Lloyds. Lloyds Register of British and Foreign Shipping.

Q. And from the same place you took the depth of the “Duc d’Aumale”?

A. Yes, sir.

Q. And her breadth?

A. Yes. [321]

Q. Do you remember what her breadth is?

A. Yes, 40.3 feet. Her depth of hold is 22.5.

Mr. CAMPBELL.—Q. Just explain to us what the Lloyd’s Register of British and Foreign Shipping is?

A. Lloyd’s Register of British and Foreign Shipping is a register published by the scientific end of Lloyd’s, in London, and gives the length, breadth and depth and the general particulars of all the ships in existence in the world.

Mr. HENGSTLER.—Q. If you should hear that

(Testimony of David W. Dickie.)

the testimony in this case was that the breadth of the "Duc d'Aumale" is not 40 feet but is 45 feet, you would modify your curve of stress, would you not?

A. I think I would doubt the testimony.

Q. And you would doubt the testimony?

A. Yes, sir.

Q. You think the testimony is wrong?

A. I would think the man was mistaken.

Mr. CAMPBELL.—Q. What reliance is placed by the shipping world upon Lloyd's Register?

A. All the reliance possible to a book of that kind. Lloyd's Register stands very high among the shipping people. If there is any doubt about the dimensions in Lloyd's as compared with the statement of any witness, I should doubt the witness. In my whole life I have only discovered one mistake in the book.

Mr. HENGSTLER.—Q. You have discovered a mistake?

A. Only one, but there are thousands—

Q. (Intg.) If the captain of the ship said that, would you still prefer Lloyd's statement as to what the dimensions of the vessel were?

A. If the captain had measured it, and after he measured it and took the dimensions with a rule, then I would investigate for myself to see if he was right. But if he had [322] not actually measured it I would doubt his statement very much as compared with Lloyd's Register.

Q. If the dimensions generally of the "Duc d'Aumale" are different from the dimensions as you

(Testimony of David W. Dickie.)

got them from information from Lloyd's Register, or any other source, if they are different, that would change your curve of stress, would it not?

A. That would only change it in type; it would not change it very much. The character of the curve would remain exactly the same. It would merely change the quantities a little bit.

Q. It would change the quantities; it would change those extreme points?

A. Yes. You see this represents quite a large quantity, so you would have to make quite a big change in the quantity before it would show on this curve.

Q. Supposing the testimony showed that that pile of pig iron which was in the lower hold of the vessel was wider than the dimensions upon which you based your curve, that would also change the curve?

A. That would not change the curve, only the length of it.

Mr. CAMPBELL.—Of course, we object to that, if your Honor please, as an improper hypothesis as the dimensions were given by the master of the ship himself in his testimony.

Mr. HENGSTLER.—The dimensions which you stated?

Mr. CAMPBELL.—The dimensions of 36 feet at one end and 23 feet at the other.

Mr. HENGSTLER.—I think the testimony of Captain Rio shows, as I remember it—it is true I have not read it recently—that the pile is wider than the dimensions which you stated, and it shows that

(Testimony of David W. Dickie.)

that pile covered an area of 2,700 square feet. That is my recollection.

Q. What is the area of the pile upon which you based your curve? [323]

A. The area does not enter into my calculations at all, merely the length of it.

Q. You do not consider the breadth of the pile?

A. No; only the weight of it and the length of it.

Q. Nor the height of it either?

A. The height of it is covered by the weight.

Q. And the length of it and the weight of it?

A. Those are the only two things that affect this calculation whatsoever.

Q. If the pile were moved further to the wings than it was in this case, and it had the same length and the same weight, it would produce the same curve, would it?

A. It would produce the same curve, yes.

Q. If the pile is exactly in the center line of the vessel that produced this curve? A. Yes.

Q. And if you moved that pile into one wind, it will produce the same curve? A. Oh, no.

Q. You just said so.

A. But you did not say that before. If you move the pile into one wing that lists your ship and that changes my curve.

Q. That changes your curve? A. Yes.

Q. Did you not say a little while ago that it did not make any difference whether your pile was in the center line of the vessel or whether it was moved nearer to the wings?

(Testimony of David W. Dickie.)

A. That is a different class again.

Q. I do not mean entirely into the wings, but moved near to the wings?

A. That does not make any difference provided you keep the vessel upright.

Q. Provided you keep the vessel upright it would produce the same curve?

A. It would produce the same curve. [324]

Q. In other words, you would say the stress on the hull of that vessel would be exactly the same whether you put the pile exactly along the center line or whether you moved it to the starboard side or to the port side, it produces the same stress upon the vessel?

A. No, if you put the pile in the center of the ship it produces the same sheering stress on the ship as if you put one-half of it on each side in the wings; if you put one-half of it on each side in the wings and leave a wide pathway down through the center between the two piles, that produces another stress on the ship which has not been taken into this calculation at all and which we are not interested in.

Q. I did not, however, speak of such a condition of affairs at all; I spoke of the case where you moved your pile bodily more toward the starboard or bodily more toward the port side of the ship, not where you divided it into two piles?

A. If you moved the pile bodily toward the port then you list your ship to port and that produces a different basic curve, to begin with, because your buoyancy curve then is of different shape.

Q. What you attempt to illustrate here is—

(Testimony of David W. Dickie.)

A. (Intg.) The ship floating in smooth water.

Q. It is the longitudinal stress, is it not?

A. Yes.

Q. Not the latitudinal?

A. No, not at all; that is a different calculation.

Q. That would be an entirely different calculation?

A. Yes.

Q. All that you are attempting to do is to give a picture of the longitudinal stress?

A. Of the longitudinal sheering force.

Q. Would not that be exactly the same if you moved the pile [325] toward the port or toward the starboard, without producing a list?

A. Without producing a list, yes.

Q. It would be exactly the same curve?

A. The longitudinal sheering stress would be the same.

Q. And therefore your curve of stress would be the same? A. Yes.

Q. Supposing that the "Duc d'Aumale" under the data you have here, had been loaded with coke alone, and without having any pig iron at all, how would that effect the curve of stress?

A. That sheering stress would probably disappear altogether except right at the masts there would be a little point that would stick up like that; the rest of it would automatically disappear.

Q. Your curve also depends upon the different weights as they are distributed throughout the vessel, for instance, the weight of stores, does it not?

A. Yes; this curve takes that in; you will notice

(Testimony of David W. Dickie.)

there is a lump there in the curve; the upper part there is stores; likewise there is a lump at the forward end, the result of the weight of anchors and chains.

Q. How did you arrive at the weight of the stores?

A. I just took the ship complete at light draught, which gives the weight of stores and everything, crew and effects.

Q. But you are guessing there, are you not, at the weight of the stores? A. Oh, no.

Q. It might be twice that weight?

A. I am taking the normal amount of stores.

Q. You do not know whether she carried the normal amount of stores or not, do you?

A. I don't know that, no.

Q. What is the normal amount of stores?

A. In ships of that type it runs about 15 tons.
[326]

Q. 15 tons?

A. It is a very small amount compared with the total displacement of the ship upon which we are working. The total displacement of the ship in this case is 4,090 tons; 15 tons will not affect this calculation whatsoever; it affects it but it does not affect it so that it shows.

Q. The stress exercised upon the bottom of this ship as it is represented in your curve also assumes the uniform strength of the bottom of the ship, does it not?

A. No; the stress that is represented here is independent entirely of the strength of the ship in any way, shape or form. This represents the stress on

(Testimony of David W. Dickie.)

the ship. Now, I wanted to bring out the point of whether the ship was good enough, but the counsel, Mr. Campbell, said he did not want to enter into that. The remark that I made on that was ruled out.

Mr. CAMPBELL.—I have no objection to Mr. Henstler going into it if he wants to; I did not want to broaden the examination any more than was necessary.

Mr. HENGSTLER.—I certainly do not want to, either.

Q. Does it depend on the lines of the ship, if the ship tapers toward the extremities?

A. Yes, that comes in the curve. You see my buoyancy curve is very small at the end. You see I have here—

Q. (Int.) I am satisfied with your answers; I do not care for any further explanation on that point. Now, Mr. Dickie, do you think you would be as capable of figuring out theoretically the stress upon the hull of this ship under an assumed stowage, would you be as capable as the builders of the ship themselves would be?

A. Why, yes, because I worked for some of the big builders of the United States and Scotland doing that very thing. [327]

Q. Is it not a fact that the builders are frequently surprised after building a vessel at the way in which she acts with different kinds of stowage?

A. They are only surprised where they have neglected to make the calculations.

Q. Only where they have neglected to make the

(Testimony of David W. Dickie.)

calculations? A. Yes, sir.

Q. If they are careful builders and make their calculations carefully you think they are never surprised?

A. No, they should know right away.

Q. The ship always acts in the way she is expected to by the theorists, by the builder, by the naval architect? A. Yes.

Q. Now, don't you know that that is not so? Have you not read frequently that the best builders in the world are greatly surprised at the way in which ships act when you put them out in the ocean?

A. Yes, but that is because they have neglected to figure them and because the builder is depending very often on a chief draughtsman, or upon a scientific man to do his work, and the chief draughtsman, by reason of press of work or for other things, other reasons, very often neglects things and takes the chance that it will be all right and then the surprise is evinced afterwards, after he takes the chance. But there is no surprise about the stowing of the ship because that can all be determined after the ship is finished.

Q. Is it not true that your theory frequently breaks down when such innumerable forces as come into play on the ocean act upon the ship?

A. Those innumerable forces have been taken care of by years and years of experience and recorded results by Lloyds, which I [328] have mentioned before. They have issued a book of rules on the construction of ships, which takes care of these things.

(Testimony of David W. Dickie.)

Q. And that is based not upon theoretical calculations but upon experience; it is empirical rather than theoretical?

A. No. The old original rules were based on purely the rule of some and the practice of certain shipbuilders, but that was found by experience to be too expensive a method on the insurance companies; now, they have probably one of the most highly technical staffs in the world at Lloyd's, and everything is dealt with technically, and then is backed up by practical experience.

Q. The one who has had practical experience with the ship is better qualified, is he not, to tell for instance how she should be stowed than one who has never stowed her before?

A. No; a man who has had practical experience with the ship would know her various idiosyncracies, but there is no reason in the world why you cannot take the plans of a ship and put the stowage on her properly as it belongs.

Q. You can do that safely as a theorist?

A. Yes.

Q. You can tell how the vessel should be stowed, without having had any previous experience with her?

A. Without having had any previous experience with the vessel whatsoever.

Q. Do you know to what extent the French builders changes those British designs which you say were introduced into France for the purpose of building vessels to suit their purposes?

(Testimony of David W. Dickie.)

A. They made changes but they were largely in the equipment. The French people make very *compasses* and very fine instruments of that kind and they *put* a great deal of finishing work, which the British people do not do; but in the actual [329] structure of the ship they made no material changes.

Q. You know that one of the great policies in French ship trade and French navigation is the bounty policy? A. Yes.

Q. To fit the ships to the bounty laws? A. Yes.

Q. Do you know what changes were made in these French ships for the purpose of adapting them to the bounty laws?

A. No, I am not familiar with the French bounty law. I know there is such a law. I have been informed, but it is merely hearsay, that the law was made to suit the ships which were in existence at the time; that is to say, suit the experience of ships.

Q. You do not know that the structure of the ships was materially altered after the bounty law came into existence for the purpose of adapting the ships to the bounty law?

A. The structure of every one of those French ships that I have examined has been the same as British ships of the same type.

Q. How many of them have you examined?

A. Oh, 5 or 6 of them that have come in here in trouble.

Q. Here in San Francisco? A. Yes.

Q. What cargo did they bring here?

(Testimony of David W. Dickie.)

A. The "Chateau Briand" brought coke and pig iron.

Q. Just like the "Duc d'Aumale"?

A. It was stowed differently than in the "Duc d'Aumale."

Q. Was it stowed substantially in the same way?

A. No, the pig iron was distributed over a larger area of the ship, over a larger length of the ship.

Q. What was the length of the pig iron in the "Chateau Briand"?

A. I do not remember the exact details. [330]

Q. What was the length in the "Duc d'Aumale"?

A. In the "Duc d'Aumale," I do not remember that either, but I have that figure here.

Q. 63 feet, was it not?

A. Yes, I believe that is the figure; I wanted to verify that. I took that from the reports.

Q. That was a very considerable length, was it not, that the pig iron in this case covered?

A. In my opinion it was not long enough.

Q. If this book of Walton's that you mentioned awhile ago and cited as an authority, if that book states that it is impossible to design a ship to behave always in the same manner among waves—on page 160 of that book, do you doubt that statement?

A. No.

Q. That is correct, is it?

A. That statement is not complete. A ship will behave in the same manner amongst waves if she is properly loaded, if the waves are the same in every case.

(Testimony of David W. Dickie.)

Q. It depends, of course, upon the waves, does it not?

A. Yes, as much as upon the ship. That is the trouble with that book, the statements are not always concluded.

Q. Otherwise the statement is correct, that it is impossible to design any ship to behave always in the same manner in the waves; that statement is correct with the exception of your qualification?

A. As amended it is correct.

Q. Mr. Dickie, has the metacenter of the vessel anything to do with the amount of stress exercised by the cargo upon the hull? A. Yes.

Q. Has it much to do with it?

A. It has a great deal to do with it.

Q. Has it not everything to do with it?

A. No, it has not everything to do with it. I will state— [331]

Q. (Intg.) Just answer the question. You say it has a great deal to do with it. Do you know what the metacenter is of the “Duc d’Aumale”?

A. The metacentric height of the “Duc d’Aumale” when she left Brest was about 3 feet.

Q. How do you know that?

A. I have figured it up from the designing formula and from the stowage which Mr. Campbell gave me.

Q. Is it not a fact that for the purpose of determining the metacentric height one must actually experiment with the ship itself and must know the ship?

A. Not with a new ship. We tell the metacentric

(Testimony of David W. Dickie.)

height of a ship long before the keel is laid.

Q. As a builder you determine the metacentric height before she takes any cargo on her?

A. Yes, sir.

Q. Does the metacentric height when she has cargo, when she is stowed, correspond with your theoretical metacentric height?

A. The metacentric height has to be changed to suit the cargo. You introduce the cargo into your calculations.

Q. In other words, experience is necessary for the purpose of determining the metacentric height?

A. No, it is entirely independent; suppose you stow the ship in a certain way—

Mr. CAMPBELL.—Just one moment. I do not know whether the Court understands what is meant by the metacentric height, or not?

The COURT.—I do not, but I thought I would find out before we got through with the examination.

Mr. HENGSTLER.—Q. Explain what is meant by metacentric height?

A. Let me explain those two points; we have one [332] point called the center of gravity which is a point upon which if you hang the ship you could turn her in any position whatsoever and she would remain in that position. That is the center of the weight of the ship. Just like this pencil; you balance it on your finger, the center of gravity of that pencil is above your finger, right in the center of the pencil. The metacenter is the point upon which a ship swings like a pendulum, and the point of meta-

(Testimony of David W. Dickie.)

center changes with the amount that the ship is immersed in the water, and with the design. The center of gravity for the ship without any cargo is in one position and when you add the cargo you move the center of gravity of the ship to suit the new position of the total mass; the distance between the center of gravity and the metacenter is what is called the metacentric heart. In our calculations we have abbreviated it to G. M.

Mr. HENGSTLER.—Q. The proper metacentric height for the purpose of loading a particular cargo in the vessel can only be determined, can it not, by experience? A. No.

Q. You think it can be determined theoretically?

A. You load your ship and figure your metacentric height, and if your metacentric height is not correct then you move the loading of the ship. Suppose after loading this ship with 600 tons of pig iron on the bottom you found that the ship had too much metacentric height, you would proceed and move on your drawing part of those 600 tons from the bottom up to the between-decks and then you would find your new center of gravity and find out if the new metacentric height which you had found was correct.

Q. In other words it is an empirical problem, is it not?

A. The metacentric height has been found by experience to vary [333] for sailing ships of this type with a *long* of stability 2 feet 6 an with a short range of stability 3 feet 6; so you can go anywhere between 2 feet 6 and 3 feet 6 with perfect safety.

(Testimony of David W. Dickie.)

Q. Now, Mr. Dickie, I show you a drawing here of the "Duc d'Aumale" and of curves, which you probably recognize; can you read French?

A. Very slowly.

Q. What do you consider these curves to indicate?

A. These look to me like curves of stability.

Q. Not curves of stress?

A. That looks to me like the same curve that I have here; yes, I guess that is what it is.

Q. Yes, that is what it is.

A. It says here "Maximum, 1675 tons." Yes, that is the same curve that I have here, the sheering stress.

Q. It is the same curve you have there. If I tell you that these curves are made by the builders of the ship, you are gratified to find that they agree with you?

A. I don't know whether they do agree with me. I do not know whether the quantities agree with mine.

Q. Roughly speaking, that curve is based here upon the supposition that the vessel weighs so much, 1,396 tons, that the pig iron weight 660 tons, and that the coke weighs 2,035 tons, which is the same as yours?

A. That is remarkably close.

Q. And that the cargo is distributed in the way in which it was actually loaded at Rotterdam, just the same data that you have there; and you have produced practically the same curve of stress.

A. Yes, it looks to be exactly the same. I cannot read these French marks to tell what the quantities

(Testimony of David W. Dickie.)

are. The bending moment is different from any sheering force curve. The bending moment is like my sheering force curve, it is the same principle carried one step further. [334]

Q. You have noticed that the second curve, in the second case, it is assumed that the weight of the ship is the same as before and that she carries nothing but coke; then that curve is produced by the builders and they find that in that case that is the second curve.

Mr. CAMPBELL.—Mr. Hengstler, won't you mark this? I think we will ask to have that offered in evidence. It will undoubtedly save the taking of that deposition abroad of which you have spoken. I did not understand you had that diagram.

Mr. HENGSTLER.—It is marked the second case. The second case is the case where there is nothing but coke carried in the vessel, no pig iron. The curve is the curve which is marked here "Second case." Then there is a third case treated here, assuming that the weight of the ship is the same as before and assuming that the cargo is distributed evenly, that the pig iron is distributed evenly. Do you notice here the weight of the coke is the same as before; the weight of the pig iron is distributed, 200 tons in the forward part of the vessel, being moved further forward, 350 tons being left where the cargo was originally stored—no, I have that wrong; the 200 tons being moved back further to the rear, the 350 tons being left where the cargo was originally stowed and 50 tons being carried forward; the curve

(Testimony of David W. Dickie.)

corresponding to that curve—I think that is substantially the Buenos Ayres loading.

Mr. CAMPBELL.—In the Buenos Ayres loading there were 110 tons carried forward, 50 tons on the port side and 60 tons on the starboard side.

Mr. HENGSTLER.—That may be so. I do not remember the figures of the Buenos Ayres stowage. These figures may not be the exact figures; I do not know whether they are, or not; but [335] nevertheless this is a case where some of the cargo was taken forward and some taken backwards. The curve corresponding to that is marked here the “Third Case.”

Mr. CAMPBELL.—Suppose that you put your diagram on the blackboard so that the Court can see it.

Mr. HENGSTLER.—Q. The principle upon which the two are constructed are the same, Mr. Dickie, are they not? A. Yes.

Q. The curve corresponding to the second assumption, namely, that there is only coke carried, is the second case here; the curve corresponding to the third assumption is marked the third case here. What does that indicate with reference to the strain upon the hull of the vessel as far as the opinion of these people is concerned in the second case.

A. Was that calculation made for smooth water? What does it show?

Q. It does not show anything about that, but how could it be made except in smooth *weather*?

A. It can be made in three ways. It can be made

(Testimony of David W. Dickie.)

by putting the ship on the crest of the wave, in which case she would get one bending moment; in another case putting the ship in the hollow of the wave, and also putting the ship in absolutely smooth water, in which case you would get another case.

Q. Well, what would be the effect with reference to the strain?

A. The bending moments would not be that shape.

Q. In what way could they be influenced or modified.

A. If you put this on the crest of the wave, this curve would come down here and would go out at the end. I refer to these two particularly. These two are pretty complicated.

Q. I wish you would tell the Court what the general effect [336] with reference to the strain.

A. The bending moments would not be that shape.

Q. In what way could they be influenced or modified?

A. If you put this on the crest of the wave this curve would come down here and would go out at the end. I refer to these two particularly. These two are pretty complicated.

Q. I wish you would tell the Court what the general effect on the stress would be if you put your ship outside of those curves?

A. This curve deals with a different strain from the strain I am dealing with here. This curve deals with the bending of the ship as a whole. It gives me the strain on the upper part of the girder and on the lower part of the girder. That very likely has

(Testimony of David W. Dickie.)

been taken in the worst case, on the crest of the wave; I should imagine that by looking at it.

Q. Would it be probable that anybody would assume this vessel to be on the crest of the wave for the purpose of determining the strain of the cargo upon the hull? What is the most likely case?

A. That is the most likely condition because that is the worst condition.

Q. So, under the worst condition, it would then appear that with the stowage as it was in Rotterdam the vessel would have less strain than if she had been loaded with coke alone or if the cargo of pig iron had been distributed in the hold?

A. She would have less bending moment but not less sheering force. For example, if I integrate the sheering force curve, that will follow up and make a bending moment curve just the same as that. The bending moment in this ship does not enter into it at all; the ship has not shown any strain on the bending moment at all. [337]

Q. You are always figuring on account of something which you have been told about it, are you not?

A. No.

Mr. CAMPBELL.—He has not been told anything about it; it has been taken from your depositions.

A. (Continuing.) I made this thing with a clean sheet and with an open mind and an absolutely unbiased position. I have made this calculation, and the calculation has shown me that here is an excess of sheering force—not of bending moment.

(Testimony of David W. Dickie.)

Mr. HENGSTLER.—Q. But the bending moment under the circumstances would be less than if the cargo were distributed over the hold?

A. Quite possible, but you have had no trouble from the bending moment.

Q. How do you know of that?

A. That is, I have not been told of any.

Q. You are assuming that the damage was due to the sheering force and not to the bending moment?

A. Yes, sir.

Q. That is your assumption, is it not?

A. Yes, sir.

Q. But you do not know anything about it?

A. No.

Q. If the sheer at the extremities of that pile is greater than anywhere else on the bottom, as you think it is, do you not? A. Yes.

Q. And if the place where the sheer operates is stronger than other parts of the vessel, than the parts forward or the parts toward the stern, then you would say that the stowage was all right, would you not? A. No.

Q. If the foundation is stronger than it would be if you moved it to weaker parts of the vessel?

A. No, because your sheer for example, right in the middle of the load goes down to nothing. [338]

Q. How do you know that?

A. Because the curve shows it. Wherever the curve crosses the base line there is no sheering force.

Q. Your sheers are also determined here, or at least by your testimony, with reference to the masts,

(Testimony of David W. Dickie.)

are they not? A. Yes.

Q. How do you know where the masts were in the ship?

A. From the plans of a ship of that type.

Q. Have you ever seen a plan of the "Duc d'Aumale"? A. No.

Q. You have never seen it?

A. Well, you have it right there if you introduce that in evidence.

Q. Did you follow the stowage plan that you spoke of? You saw the stowage plan, did you not?

A. Yes.

Q. Did you follow that in determining the position of the masts?

A. No. In the stowage plan the masts were put on—the stowage plan was a printed plan and the masts were put on just merely to illustrate.

Q. And you did not use that? A. No.

Q. You used the plan of a vessel of that type?

A. Yes, sir.

Q. What vessel was that?

A. I think I used the "Chateaux Briand" for the location of the masts; if my memory serves me right I used the "Chateaux Briand" for the location of the masts.

Q. Are you sure about that?

A. No, I am not.

Q. You do not know where the masts of the "Duc d'Aumale" are located?

A. Not within a foot or so. But that did not change my calculation.

(Testimony of David W. Dickie.)

Q. It would not make any difference where those masts are located?

A. Not 6 inches or a foot. It would [339] alter my calculation but it would not make any material change in the result that would affect this testimony.

Q. With reference to the strain which is exercised upon the masts themselves?

A. Even with reference to the strain because I took that strain on the masts into account. If I moved that one foot forward, or one foot aft, that would not have changed my curve, that is, it would not have changed it so that the average layman could have noticed it.

Q. It would have changed to some extent?

A. To a little extent, yes, sir.

Redirect Examination.

Mr. CAMPBELL.—Q. Mr. Dickie, in this drawing which counsel has produced here for the first time shows an accurate location of the mizzen mast of the “*Duc d’Aumale*” can you tell by measuring with a rule how close that is to the position that you placed the mast in your calculations?

Mr. HENGSTLER.—On the assumption that it shows it correctly with reference to the masts.

Mr. CAMPBELL.—I suppose it does. You have produced the drawing here.

Mr. HENGSTLER.—Well, Mr. Campbell, you know perfectly well that the masts have no relation to the stowage plan, that they are placed anywhere,

(Testimony of David W. Dickie.)

that they are not drawn to a scale at all.

Mr. CAMPBELL.—Then you admit that your drawing in that respect is not accurate?

Mr. HENGSTLER.—So far as the positions of the masts are concerned I have no doubt at all that they do not enter into the calculation at all and that they are simply drawn in any way. That is always the case with stowage plans. [340]

Mr. CAMPBELL.—Is this a stowage plan?

Mr. HENGSTLER.—No, it is not a stowage plan.

Mr. CAMPBELL.—It is a plan made by the builders, is it not?

Mr. HENGSTLER.—It is a plan made by the builders. I will certainly not admit that the position of the masts are supposed to be drawn to scale because the masts do not enter into the calculation.

Mr. CAMPBELL.—Well, let us see how close they are to what you have drawn them. Of course, we do not want any guess work.

A. It seems to be about 2 or 3 feet on that plan different from on mine.

Q. How much would that alter your curve?

A. That would merely move the point over here about that much.

Q. That is the peak? A. Yes.

Q. The curve above the base line would move to the right? A. Move to the right, yes.

Q. Would that indicate that the mizzen mast was further forward or further aft than you have it?

A. That would indicate that the mizzen mast was further forward.

(Testimony of David W. Dickie.)

Q. What are the curves or the stresses which the builders have shown upon the chart produced by counsel?

A. Those are the standing bending moment curves. I would say, not knowing anything to the contrary, that they have taken it in the worst case.

Q. What is the difference between the bending moment and the sheering moment?

A. The bending moment is the moment on the ship tending to bend her, bending the structure as a whole. The sheering moment on a ship is the sheering force tending to cut [341] the ship off, as illustrated by Walton in that figure which I described in my testimony; but the sheering force of the cargo, the greater part of it comes on the bottom of the ship and produces these stresses; whereas the bending moment comes on the ship as a whole.

Q. Can the curves, then, which have been introduced by counsel be compared with the curves which you have made for the purpose of criticising your curves?

A. Only for the purpose of integrating my curves.

Q. Well, suppose you integrated your curves, how do you think it would compare with the markings up and down across the base line?

A. I think it would be about the same.

Q. Does the metacentric height which counsel went into affect the sheering stress of the stowage of the cargo, or does that enter into the capsizing moment?

A. The metacentric height affects not the stowage of the cargo but adds to—for example, here is a ship

(Testimony of David W. Dickie.)

and here are the masts and the sails on it; here we have the rigging, the shroud; when the wind is blowing from this direction the vessel leans over like that and this shroud loosens up; now you have a strain here on this shroud to keep the mast from going overboard; you have a corresponding strain on the mast pushed down; to complete the couple the strain comes up through the side of the ship. This load that comes down through the mast is added to the load which I have here. That is independent of the cargo altogether.

Q. So as to get them in the record, when your ship is keeled over, then you have an upward stress on the windward shrouds? A. Yes, sir.

Q. And a downward stress on the masts?

A. Yes, sir. [342]

Q. And an upward stress on the windward plating of the ship? A. Yes, sir.

Q. And you took that stress into your calculation in figuring the sheering stress?

A. I did not take it into this.

Q. Because your curve is figured with the vessel in smooth water? A. In smooth water.

Q. That was not exactly what I was getting at. In calculating the metacentric height of a vessel, is it for the purpose of determining the capsizing moment or for the purpose of determining a sheerage stress of the stowage of cargoes?

A. The metacentric height is for the purpose of calculating the capsizing moment and is independent

(Testimony of David W. Dickie.)

of the sheering force except as I mentioned about the mast.

Q. Does the metacentric height of a vessel enter into in any respect the condition of her stiffness and her stability? A. Yes.

Q. In what respect?

A. A tall metacenter, a great metacentric height indicates a very stiff ship; a low or a small metacentric height indicates what we call a tender ship; a negative metacentric height, where the metacenter is below the center of gravity, the ship will upset in smooth water.

Mr. HENGSTLER.—Q. Is it not just the opposite, Mr. Dickie, namely, that a small metacentric height indicates stiffness?

A. A small metacentric height indicates a tender ship.

Q. Then Walton is wrong again, is he not, if he says the opposite?

A. I do not believe he says so.

Q. But if he says that, he is wrong?

A. If he says that he is wrong.

Mr. CAMPBELL.—Q. You mean by stiffness the tendency of [343] a vessel to remain upright?

A. Yes, sir.

Q. And by tenderness you mean the tendency of a vessel to ease off? A. Yes.

Q. Do you in this calculation of sheering force in any way take into consideration the metacentric height?

A. None except in this way; I made one answer in

(Testimony of David W. Dickie.)

which I gave an additional stress on the bottom due to stiffness of the ship. I took it into consideration in that particular answer but that is the only answer.

Q. If the stores that you figured at 15 tons had weighed double that amount, namely, 30 tons, would that have made any great difference in your sheering stress curve?

A. No. This curve is too small; when you take into account that I have represented 4,090 tons, you can imagine what a very small area of that curve will be represented by 15 tons.

Q. If you had a cargo of all the same character of material, say for instance bulk coal or bulk coke or bulk barley, would you then have a sheering stress such as is shown there?

A. No, the sheering stress would be different. The sheering stress in that case would be more of an even curve. It would swing over in that direction.

Q. What would the sheering stress then be due to?

A. Just the lack of buoyancy at the ends to support the ship, the bare ship itself, and the excess of buoyancy in the middle to make up the lack of buoyancy at the end.

Recross-examination.

Mr. HENGSTLER.—Q. The effect of a sheering stress is to produce a strain upon certain parts of the vessel?

A. To produce a vibrating strain.

Q. And the effect of a bending stress is to produce a strain— [344]

A. (Intg.) A pulling and a pushing strain.

(Testimony of David W. Dickie.)

Q. Both of them produce strains?

A. Both of them may produce strains, but of different types.

Q. If the "Duc d'Aumale" is loaded first in the way in which she was loaded at Rotterdam, and afterwards in reloading her she was loaded in the way in which she was loaded at Buenos Ayres, the pig iron distributed more, by the change in the loading the sheering strain was lessened and the bending strain was heightened?

A. That could be quite possible, yes; I will not answer that question definitely without I make the calculation myself.

Q. But that is quite possible?

A. It is within the bounds of possibility, yes.

Q. That it might produce a greater bending strain and a lesser sheering strain? A. Yes.

Q. You have the choice as between stress in so far as the change in the loading is concerned?

A. Yes, sir.

Q. If any of these curves here were made on the top of the wave, you would say that that was under the worst circumstances?

A. I would have to put this vessel on the crest of a wave and put her in the hollow of a wave and actually figure it out before I could make a definite answer to that.

Q. If it is on top of a wave there are other strains coming in? A. Other sheering strains?

Q. Other sheering strains and also other bending strains? A. Yes.

(Testimony of David W. Dickie.)

Q. What would you call the strain that is produced by putting a vessel on top of a wave, what effect has it on a ship generally?

A. The vessel on the crest of a wave, it is called a hogging strain, and on the hollow of a wave it is called a [345] sagging strain.

Q. If it is on top of a wave, or if it is on the hollow of a wave, there are special strains coming in; if on top of the wave the tendency of the extremities is to come down and push up the middle? A. Yes.

Q. That is why it is called the hogging strain?

A. Yes.

Q. And if on the hollow of the wave, she is supported on the extremities and the tendency would be for the middle to sag down? A. Yes.

Further Redirect Examination.

Mr. CAMPBELL.—Q. Would the movement of the wave affect the sheering strain at all?

A. Yes, it does affect the sheering strain because it changes the shape of my curve of buoyancy.

Q. Would it change it corresponding to what counsel has asked you?

A. I do not understand your question.

Q. You say that movement of the ship upon the wave would change the sheering strain? A. Yes.

Q. I say would it change it in a corresponding manner to that described by counsel in his question just now? A. Yes, practically.

Q. For our own information, Mr. Dickie, is it possible for designers of a ship like the "Olympic," the

(Testimony of David W. Dickie.)

great ship that has just been built, to calculate before her keel is laid just what her water line will be?

A. Oh, yes, it is calculated to within half an inch.

Q. Is calculated as to the amount of water she will draw? A. Yes.

(A recess was here taken until 2 P. M.) [346]

AFTERNOON SESSION.

**Testimony of David W. Dickie, for Libelants
(Recalled).**

DAVID W. DICKIE, recalled for further examination.

Mr. CAMPBELL.—I will offer in evidence, if your Honor please, the drawing made by Mr. Dickie, and with Mr. Hengstler's consent, I will also offer the other drawing.

Mr. HENGSTLER.—I will offer the other drawing in evidence.

(The drawing of Mr. Dickie is marked Libelant's Exhibit "E," and the drawing offered my Mr. Hengstler is marked Respondent's Exhibit No. 1.)

Mr. CAMPBELL.—Q. I wish you to explain a little more, Mr. Dickie, the character of sheering strain which is produced on the vessel and the location of that strain.

A. The character of the sheering strain is best illustrated by using this book. The sheering strain tends to bend the bottom of the vessel like that (illustrating), at the point where the bottom of the curves or the top of the peaks.

Q. What does that represent in actual stowage?

(Testimony of David W. Dickie.)

A. That represents in actual stowage the ends of the pig iron.

Mr. CAMPBELL.—If I may, I will lead the witness to the extent to make it clear.

Q. That strain is as though you take the edge of a book between your finger and thumb—

A. Close together.

Q. And work them up and down?

A. And work them up and down.

Q. What would be the bending strain as indicated by the drawing produced by the counsel?

A. That would be represented by taking the book and holding the two ends so that it could not slip by, and bending like that (illustrating); the lower edge will cripple in a hogging strain and the upper edge will cripple in a [347] sagging strain. What actually happens in a ship is that the metal compresses together like rubber and stretches on the lower edge. I am speaking of the builders bending moment curve. The way we measure that stretching or compressing of the metal is by a Stromeier's Strain indicator. The way we take the strain is by passing a piece of wire through the steel, and with a very small fulcrum we take another piece of wire and fasten it on this metal (pointing). When the metal comes together we multiply the compressing or stretching of the metal by using a very short fulcrum between the wires and a very long straw away from the fulcrum, which multiplies the motion at the end of the straw so that we can see it and measure it.

(Testimony of David W. Dickie.)

Q. Where does the bending strain affect the vessel?

A. The bending strain affects the vessel as an entirety, as a total structure.

Q. In what portion of the vessel will it have the greatest effect?

A. The bending strain will have its greatest effect along the deck of the vessel, tending to stretch the deck and tending to compress the bottom of the vessel.

Q. Where would the sheering strain have its greatest effect, on what portion of the vessel?

A. On the bottom of the vessel where the load is resting.

Q. In your judgment, what effect would a sheering strain such as you have described have on the butts of the plating on the bottom of the vessel?

A. I am assuming that the Court knows how a butt is made.

Q. We had it described this morning.

A. When *you moving* the plating or the parts of the ship by [348] one another the butts of your plating close together, or open out, and it destroys the caulking. For that very reason we now lap the plating of the ship because when you move the lapped plating, the caulking is so arranged that the original spring of the plate takes up this motion.

Q. Would such a sheering strain have the effect in your judgment to cause a butted plate to leak?

A. Such a sheering strain would, yes.

(Testimony of David W. Dickie.)

Further Cross-examination.

Mr. HENGSTLER.—Q. As far as one bending strain is concerned, Mr. Dickie, are you prepared to say it does not affect the bottom of the vessel?

A. No, sir, I am not prepared to say it does not.

Q. It affects the bottom of the vessel?

A. It does affect the bottom.

Q. It may affect part of the bottom of the vessel, may it not, taking into consideration the experience that the ship has got struggling with the waves at the same time?

A. Yes, sir; it will affect any part of the vessel though it might not affect them so that you would notice it.

Q. You cannot tell exactly how it will affect different parts of the bottom, can you?

A. Not without taking each part in detail.

Q. Would the bending strain, if there is a bending strain, exercised on the hull of the vessel, produce leaks in the vessel?

A. You mean if you have an excess of bending strain it would produce a leak? It is quite possible to have a large bending strain, and you will not have an excess because the neutral axis of the equivalent girder of the vessel—wait a moment. I have got that wrong, I made a mistake. The vessel has such a [349] large equivalent girder and the top of deck, and the bottom are quite a long distance away from the neutral axis, so that it would take quite a large strain before you would be able to notice it at all.

Q. Under the ordinary conditions?

(Testimony of David W. Dickie.)

A. Yes, sir, under the ordinary conditions.

Q. That leaves out of consideration any particular conditions that happen at sea to which the vessel is exposed at sea, does it not? A. Yes, sir.

Q. And it is a fact, is it not, that the bending strain may very materially affect the bottom and act upon any part of the bottom of a vessel?

A. Not in general practice; not in ordinary ships going to sea.

Q. The bending strain would not affect it?

A. No, sir; because the amount of material that is put in there is far in excess of anything that is necessary for bending.

Q. You are willing to state that no matter how great the bending strain is on the vessel, that that would make no difference to the bottom?

A. No, sir, that is not what I state. What I state is, you could not load the vessel, you could not put an ordinary cargo into a vessel and produce a bending strain on her that would make any material difference to the vessel unless you could put the pig lead, or something like that, right in the ends and left the whole interior of the vessel vacant.

Q. There are methods of stowage that would produce a bending strain such that it would be serious to the plates and butts in the bottom of the vessel, are there not?

A. It is within the bounds of possibility but I do not believe it is probable. [350]

Q. Would the strain upon the bottom of the vessel be greater if the vessel is improperly stowed than it is

(Testimony of David W. Dickie.)

if the vessel is properly stowed? A. Yes, sir.

Q. It would be?

A. Yes, sir. There is only one case in which that has been actually demonstrated. That had to be demonstrated on a torpedo boat in order to get the material thin enough so that the Strohmeier Indicator would indicate the strains and stresses that were in the vessel. In a torpedo boat the material is about the thickness of this (illustrating).

Mr. CAMPBELL.—That concludes, if your Honor please, the testimony for Meyer, Wilson & Co., in both these cases.

The COURT.—Have you any testimony, Mr. Hengstler?

Mr. HENGSTLER.—On behalf of the libelant in the freight case and the respondent in the damage case, I offer in evidence the depositions of Captain Lalonde, the master of the vessel, Captain Rio, Captain Ledru, Captain Beaudry, Captain Le Roy, Captain Plisson, Captain Girard. Furthermore, I offer the depositions of A. Vanveen, Dendrik van der Berg, Y. de Yonge and of E. Deddes, and as I may possibly have missed offering some depositions, any other despositions that are on file and have been taken on behalf of the ship, together with the exhibits accompanying these depositions.

(By consent Mr. Dickie is allowed to withdraw his diagram to make a tracing, and file the same.)

Mr. HENGSTLER.—If your Honor please, with reference to possible other testimony that we may

desire to take in this case, I think I explained our position to your Honor at the [351] beginning of the case. The testimony which was taken yesterday and to-day is new testimony taken years after the other testimony was introduced. I had reason to believe that the testimony formerly taken was the entire testimony and that the case would simply be argued. For that reason, very fairly and properly Mr. Campbell and Mr. Page agreed that if any new points should come into this case through the testimony taken yesterday and to-day, that I should have an opportunity to rebut that testimony. I should like to reserve the right to decide whether I wish to rebut the testimony, for one week, but I am ready otherwise to argue the case subject to any testimony that I may conclude to take. I may conclude not to take it, and I will indicate that to your Honor at the end of the week—one week from to-day.

The COURT.—Very well.

Mr. CAMPBELL.—I do not want to withdraw any stipulation made by our office, if your Honor please. The only thing is I dislike to delay the case until depositions are obtained from Europe again. Counsel might have anticipated such a line of testimony. He had in his possession these charts. If he is permitted to take depositions in Europe I shall want the order restricting him to testimony that is strictly in answer to the testimony brought out by Mr. Dickie. I purposely avoided going into a scientific explanation of what Mr. Dickie has done so as to avoid if possible the taking of depositions. In

my view of the case, under the law, I think the Court will be in a position to determine the liability without referring even to Mr. Dickie's testimony. If the Court should come to that same conclusion it may not be necessary for him to take [352] the depositions.

Mr. HENGSTLER.—I am strongly of the same opinion at the present time, but I should like to examine the testimony more closely before positively making up my mind.

Mr. CAMPBELL.—I do not see how counsel got the idea that we were willing to submit the cause on his testimony.

Mr. HENGSTLER.—This case was in charge of Mr. Page, Mr. Campbell, and we had the case once set for argument.

Testimony closed.

The COURT.—Proceed with the argument, gentlemen.

(Whereupon counsel proceeded to argument.)

[353]

Tuesday, January 18th, 1912.

Mr. CAMPBELL.—I understand, if the Court please, that there is no formal order consolidating the two cases, and I will therefore ask your Honor to make the order, namely, that the cases of Herman L. E. Meyer et al. vs. French Bark "Duc d'Aumale," No. 13,959, and the *Compagnie Maritime Francaise*, a French Corporation, Libelant, vs. The Cargo of the French Bark "Duc d'Aumale," No. 13,941, be consolidated and submitted upon the testimony and argu-

ments in the case of Herman L. E. Meyer et al, Libellant, vs. The French Bark "Duc d'Aumale."

The COURT.—Let the order be made.

[Endorsed]: Filed Feb. 6, 1912. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk. [354]

Testimony Taken in Open Court on Further Hearing.

Friday, February 2d, 1912.

Testimony of H. P. Frear, for Respondent.

H. P. FREAR, called for the respondent, sworn.

Mr. HENGSTLER.—Q. What is your business?

A. Shipbuilder and naval architect.

Q. How much experience have you had as a shipbuilder and naval architect?

A. I have been employed at the Union Iron Works for 28 years.

Q. You have been employed there as naval architect?

A. Yes, most of the time as naval architect for the institution.

Q. Do you know Mr. David W. Dickie?

A. Yes, sir. He worked under me at one time as a learner.

Q. You have read the testimony which he gave in court the other day. I showed you the testimony, did I not? A. Yes.

Q. And you have read it with reference to the strain alleged to have been exercised upon the bottom of the French bark "Duc d'Aumale"; you have read that testimony, have you not? A. Yes, sir.

Q. I will show you the curve drawn by Mr. Dickie

(Testimony of H. P. Frear.)

as purporting to describe the nature of the stress exercised upon the bottom of the vessel by the 600 tons of pig iron stowed in the hold of the vessel. I show you this curve. Libelants' Exhibit "E"; what does this curve represent?

A. This is a partial calculation to arrive at the strain forces on a vessel. There is nothing here to indicate any internal forces or any stress on the members of the vessel, but simply the forces that are acting on the outside of the ship, or upon the ship. Mr. Dickie has drawn a buoyancy curve [355] here, which you will note though not quite symmetrical is very nearly symmetrical about the center line; in other words, the fineness of the two ends of the ship, as Mr. Dickie has represented them here, are very nearly alike. Then Mr. Dickie has drawn a line here representing, as he states, the weight of the ship; in other words, a vertical line at this point we will say, taking one foot of that line represents the weight of the one foot of lineal length of that ship; then on top of that he has evidently drawn the weight of the coke along here; then he has evidently drawn the weight, as he states here, of the pig iron. He has indicated the mass at these three points. He has shown all of the weight concentrated—I don't know whether it is the water line length or the normal length of the ship. (Addressing Mr. Dickie.) Does this line represent the length of the ship or the length of the water line?

Mr. DICKIE.—That represents the length of the water line.

(Testimony of H. P. Frear.)

A. (Continuing.) He has shown nothing projected beyond the water line at either end; for instance, you have a strain overhanging and you have a bowsprit overhanging. It is essential, in order that a diagram of this kind is worked out correctly, that the buoyancy must be exactly the same as the weight that the buoyancy supports; in other words, if your ship was a little heavier than the line drawn here for the buoyancy, the ship would settle down until she came to rest. It is also essential that the center of all this weight must come in the center of the buoyancy. In other words, if the center of the weight is over here pulling down, and the center of buoyancy is over here pushing up, the ship would tip until the two came together and the ship came to rest. It does not appear from [356] the diagram here that that would exist. It does not appear that there is enough information here to make the calculation because there is a heavy bowsprit overhanging here that is not taken into account to determine the center of gravity. The stern end is not taken into account. Therefore the center of gravity of this weight area would not be the center of gravity of the ship. He has the pig iron up here. I think from a casual examination it is apparent that the weight of this outside figure—here is the weight of the coke here, the top of his weight at that point, and here is the top at that point, it is apparent that the center of gravity of this area would be considerably aft of the center of his buoyancy. Therefore the condition as it is drawn could not exist. As I take it,

(Testimony of H. P. Frear.)

Mr. Dickie has merely drawn that to illustrate such a thing as a shearing force because he has only carried his problem up to that point and then stopped. That is only one step toward the ultimate object of a calculation of this kind. The ultimate object of a calculation of this kind is to determine bending moments, which are far in excess of the shearing stress or shearing force. This is not shearing stress, it is shearing force. Stress is internal or resistant; force is application. This shearing line here is the sum of the forces acting up. So there is the maximum shearing force (pointing). That is obtained by taking the sum of all the forces acting from either end of the vessel, because they would be alike. It is the algebraic sum of all the forces acting up to that point. In other words, the shearing force is the sum of the actual forces or weights acting on either end of the vessel. Now, what is the bending moment? Mr. Dickie in his testimony [357] says that he integrated this curve of Lloyds' here. He has integrated that to arrive at this point here, or any other point. But integration is summation.

Q. To arrive at what maximum point, Mr. Frear?

A. Well, at anyone. I was just considering the maximum point. Well, maybe this is the maximum point. These two are the maximum points of shearing force, not stress. When you integrate you add. In other words, in plain English, the shearing force is the sum of all the forces or weights acting on either side of that, because they are equal. Now, what is the bending moment? The bending moment is the

(Testimony of H. P. Frear.)

sum of all the shearing forces; in other words, as an arithmetical progression, so to speak, you first add up all your forces to get the shearing force. Now, that is force. When you add up all your shearing forces to get the bending moment. The diagram is not carried beyond getting the force at any and every point—the shearing force at each and every point of the diagram is correct. And I doubt very much that it is from the fact that it appears there has been some assumption.

Q. What assumption has he made here with reference to the weight of this ship?

A. Well, take the data that is necessary to obtain this buoyancy. You must have what lines of the vessel? The lines show the section at all points of the ship, at each frame or space you want to take; and from that you can by getting the area of each section below the water line, you erect a perpendicular representing that on any scale you choose, and then taking the different points and running a line through them, that gives you the buoyancy curve. It is not only essential [358] to have the lines, but the draught and the trim. If the trim varies you have a difference at one end or the other. Now, for the weight curve, you have to have the detail weights of the vessel, you have to have the weight of that vessel at every foot all the way along in order to make it correct. You not only have to have the weight of the total vessel, and that area there must equal that weight, but you have got to know exactly how the weight in that ship is distributed, that is, you

(Testimony of H. P. Frear.)

have to be able to construct that curve from the weight taken all the way along that vessel. Then Mr. Dickie has put in the coke. Of course, what I have said as to the weight of the vessel applies to the coke. You have to have the distribution of that coke; you have to know just how much is in each foot of the vessel. And the pig iron the same way, you have to know just how that is. And he has put the mass above everything there. Now, one reason why I think there is a great deal of assumption is that I doubt very much if that curve is not a little further; that it would be in here somewheres. I would also strongly criticise the weight of the vessel as given by Mr. Dickie. I think Mr. Dickie's weight is in excess of what a vessel of that size and build would run.

Q. What leads you to think so?

A. Well, it does not compare favorably with other vessels of about that type and size.

Q. Are you acquainted with a vessel of that type and size and do you know its weight? A. Yes, sir.

Q. In such a way that you can draw a conclusion?

A. Well, there are always some differences in vessels, but by exercising proper care you can make fairly close comparisons.

Q. What vessels do you compare this one with?
[359]

A. Well, I have probably got the plans of over 50 sailing vessels. Here is a plan of a similar type. This is the "Queen's Island," a three-masted bark.

Q. Is that a French vessel?

(Testimony of H. P. Frear.)

A. No; this was built at Holland & Wolf's, Belfast, Ireland. This vessel is a little larger so far as the dimensions are concerned. If I remember, the "Duc d'Aumale" was 277 feet; this one is 282 feet. I think her beam was 40.3; this is 40.5. (Addressing Mr. Dickie.) Is that right, Mr. Dickie, that the "Duc d'Aumale" was 40.3?

Mr. DICKIE.—I do not remember the beam.

Mr. HENGSTLER.—Yes; 40.3.

A. (Continuing.) I will refresh my memory. Yes, 40.3. The depth of this vessel is 23.6, or a little more than a foot deeper than the "Duc d'Aumale," which was 22.5. Now, in addition to that, the "Duc d'Aumale" was a complete steel vessel. This vessel is part steel and part iron. When vessels were first built of that type, they were built of iron and not of steel. The construction was changed to steel for one reason, to save weight; in other words, a vessel built of iron would be 20 per cent heavier than a vessel built of steel. This vessel is part iron and part steel. The builders give the weight of this drawing at 1,280 tons, or a little less than 160 tons of the assumed weight of the "Duc d'Aumale."

Q. So here is a much larger ship?

A. It is a larger ship and part iron, and weighs less. This compares with a large number of vessels, the plans of which I have.

Q. Does this assumption affect the result that Mr. Dickie intended to convey by that curve? [360]

A. The basis of the calculation depends on all

(Testimony of H. P. Frear.)

those items, buoyancy and weight. That is the basis of the calculation.

Q. And the basis is wrong in that respect?

A. The calculation is not complete. It is only the second step in the calculation. A calculation of this kind is never carried to this point and stopped. These calculations, so far as they go, and if this was completed, apply to the ship as a whole and not to any location. It is not applicable to a local force.

Q. What part of a ship do shearing forces act upon?

A. Shearing forces act almost entirely or chiefly upon the vertical plating, or the side-plating.

Q. What forces act upon the horizontal portions, the decks and the bottom of the ship?

A. The decks—the top plating and the bottom plating—is affected chiefly and resists chiefly the bending moments.

Mr. HENGSTLER.—Does your Honor desire an illustration as to why that is necessarily so? I think Mr. Frear can give a simple illustration with a girder showing that the shearing force cannot affect materially the horizontal portions—the decks and the bottom of the vessel, the plates on the bottom.

The COURT.—I understand the way he defines shearing force as strain pressure.

Mr. HENGSTLER.—It does not affect the bottom pressure or the deck in any way, but would affect merely the sides, the side plating.

The COURT.—The sides.

Mr. HENGSTLER.—Q. Are you acquainted with

(Testimony of H. P. Frear.)

a Manual of Naval Architecture written by White?

A. Yes, sir. [361]

Q. That is a standard work, is it not, on naval architecture? A. Yes.

Q. If on page 299 of that work the author makes the following remark after calling attention to the chief strains to which ships are subjected, and calling the chief strain a strain tending to produce a longitudinal bending, hogging or sagging, that those are the chief strains in the structure considered as a whole; and he mentions then three minor strains and goes on to say as follows:

“Besides these, there are other strains of less practical importance, which are interesting from a scientific point of view but need not now be discussed as there is ample strength in the structure of all ships to resist them, and there is no necessity in arranging the various parts to make special provision against them. Theoretical shearing forces, for example are in action in all ships; they tend to shear off the part of a ship lying before any cross-section from that abaft it; but no such separation of parts has been known to take place, nor is it likely to be accomplished in ordinary ships.”

Do you approve of that statement by the author?

A. Yes, sir.

Q. What would happen to a vessel before the shearing strain could become operative so that it would cut the plating; what would have to happen long before that?

(Testimony of H. P. Frear.)

A. Which plating are you referring to?

Q. The bottom plating.

A. You would have to fracture the vertical plating. I will illustrate that with two little pieces of cardboard. If you assume that you had a ship without any side plating, the top piece represents the deck and the lower one the bottom of the ship, you could bend that, there [362] would be no great resistance, no more than the stiffness of the plate resting on its sides, which you could work up and down almost indefinitely without producing a fracture. Now, if you turn the cardboard up and even though you had no deck on at all, which takes practically only the bending moment, you could not shear that. The paper alone, if you could hold it in position, you would not have strength enough to shear that paper in a vertical position; but in the horizontal position you could work them to your heart's content and they would not fracture for a long time. It is like a piece of tin, you can bend it up and down, but put it edgewise, where it would take shearing force and resist it, you could not force it apart. You would have to fracture the side-plating before you could produce any appreciable strain due to shearing on the bottom or the top.

Q. So it is to this effect, that in the practical consideration of strains upon the bottom or on the deck, only bending forces are considered?

A. Only bending forces. You could distribute the material in a vessel in such a way that the calculation would show that she had an excess of strength; in

(Testimony of H. P. Frear.)

other words, if you took half the material off the side-plating and put a portion on the deck and a portion on the bottom, your calculation would show that that ship was very much stronger, whereas, as a matter of fact, the thinner plating might not be sufficient to resist the shearing or to keep the deck-plating and the bottom plating in their relative positions and hold them there; in other words, it might cripple. [363]

Cross-examination.

Mr. CAMPBELL.—Q. Did you ever hear of a ship's bottom working so that her seams are opened?

A. Yes, sir.

Q. Well, how is that possible, on your theory?

A. Well, that is generally due to bending.

Q. Due to bending? A. Yes.

Q. What do you mean by bending, under those circumstances?

A. I mean a ship riding on the crest or in the hollow of a wave, that she works alternately up and down.

Q. Supposing you should take a sailing vessel and not put anything in forward at all, but toward her mizzen mast, between her mizzen mast and toward the mizzen mast you should put in 1,000 tons of pig iron—take a ship like the “Duc d’Aumale”—what if any strain would that effectually put upon the bottom of the vessel in a sea?

A. It will produce a local stress there, not a general stress.

Q. A local stress? A. Yes.

(Testimony of H. P. Frear.)

Q. But that stress would tend to open her seams, would it not? A. No, I do not think it would.

Q. Supposing her seams opened up under those conditions?

A. I would say it was due to bending; you would get an excess of bending, comparatively speaking, by loading a ship in the middle. It is just like a girder; you support it on two ends and load it in the middle, she tends to bend down.

Q. So the strain which would result in loading a vessel in that way, heavier at one end and lighter at another, you would call it a bending moment; is that it?

A. I call the bending moment due to bending forces.

Q. Well you know, as a matter of fact, that that would result in a strain, do you not,—that if you loaded a vessel say [364] with 1,000 tons of pig iron at a point just forward of the mizzen mast, and put in cargo in the rest of the hold, that would strain her, would it not?

A. Well, so far as a diagram of that kind is concerned—

Q. (Intg.) Just answer the question; would not that strain that vessel?

A. It would depend upon whether it was more than the vessel was built to stand.

Q. Would it not tend to strain the vessel?

A. It would make more strain than without it, yes.

Q. That is the operation of buoyancy forces, is it not; it is due to the operation of buoyancy forces?

(Testimony of H. P. Frear.)

A. You have to have buoyancy and weight forces.

Q. The combination of the two?

A. Yes, the balance of the two.

Q. In your judgment would the difference between the weight of the cargo above and the pressure of the water below produce a local shearing force?

A. No. Maybe I did not understand that question. Will you repeat it?

Q. I say in your judgment would the difference between the weight of the cargo above and the pressure of the water below produce a local shearing force?

A. No. I stated that the local shearing stress was the sum of the forces between the given point and either end of the vessel.

Q. Would an excessive weight in one part of the vessel with an excessive buoyancy immediately adjacent to it produce a local shearing force at the point of division?

A. Well, as I understand your question—

Q. (Intg.) I cannot word it in the language of higher mathematics. [365]

A. Your buoyancy curve is a fair curve, a fair line, if I understand what you are getting at; if that would be a uniformly varying space all the way along the vessel, a fair curve—

Q. (Intg.) I will put it in this form: If there is an excess of weight over buoyancy in one part of the vessel, and immediately adjacent to it an excess of buoyancy over weight, would there be a local shearing force produced on the bottom of the vessel?

A. No, not on the plating.

(Testimony of H. P. Frear.)

Q. On the bottom?

A. No, there would not. There would be a little on the frame, but you could not strain your bottom.

Q. Wouldn't there be on the bottom as a whole?

A. Well, yes, but as I explained before, if the bottom plating was detached it would be limber and you could work it up and down. To provide for local forces or weights there is a framing inside the plating and you could not strain your plating due to a local weight until you fractured the framing.

Q. But there would be, however, a shearing force produced upon the bottom of the vessel, would there not?

A. Well, in the same way that the shearing force produced on this floor right where you are standing now—

Q. (Intg.) Well, there is, is there not?

A. If that were soft you would sink down in and you would shear a little hole right around there.

Q. So there is a shearing force at that point, however infinitesimal it may be?

A. The shearing force is taken up by the framing. There is a shearing force there but it does not come on the plating until the framing gives way. [366]

Q. If the plating showed trouble at this particular point would you not imagine it was due to a shearing force?

A. I never saw it, and I have been repairing ships all my life.

Q. You would not say there was not?

A. I certainly would. The plating is never put

(Testimony of H. P. Frear.)

there to take shearing force. The side-plating takes the shearing force, 99 per cent of it.

Q. Would the shearing force tend to produce an oscillating vibration in the plating?

A. Well, I never have heard vibration used in that term; you have to have a fixed weight and—

Q. (Intg.) Would it tend to produce the movement you get from working a paper, as I work it here with my fingers (illustrating)?

A. No, it would have to work the framing first. The framing would reach the point of fracture before you could have any perceptible movement or working on the plating. You have stiff deep floors in there, and they would have to fracture before you could strain a seam or a butt of the plating due to working up and down, as you say there.

Q. There is a certain elasticity in the frame, is there not? A. No, not very much.

Q. There is to a certain degree, is there not?

A. Not hardly measurable.

Q. What is the elastic limit of steel, in thousands of pounds?

A. Oh, it runs around 26,000,000—oh, excuse me, the elastic limit of Lloyd's steel generally runs around between 30,000 and 40,000.

Q. What is the breaking strain?

A. Around 60,000; it is 57,000, 58,000 or 59,000.

Q. Is there not a margin between those two points where the steel can vibrate? [367]

A. That vibration is not the term that you want to

(Testimony of H. P. Frear.)

use there. I never heard of vibration used in that connection.

Q. You do not know what is meant by that question? A. I do not know what you mean by it, no.

Q. How do the weights which Mr. Dickie apparently used compare with the weights produced by Mr. Hengstler?

A. You mean on this diagram?

Q. Yes.

A. He has not given any weight curve on there; he has simply given the bending moments. That is the result of the calculation.

Q. Are not the weights boxed in up there on the side? A. I do not read French very well.

Mr. HENGSTLER.—He has given the weights of the ship, of the coke and of the pig iron.

A. Well, he has given the weight of the ship there at 1396.

Mr. CAMPBELL.—Q. Are those French or English tons?

A. I would judge they were French tons; I do not know.

Q. How does that compare with the weight that Mr. Dickie gives? A. Lighter.

Q. How much lighter?

A. 44 tons; it would be greater than that if those are French tons.

Mr. HENGSTLER.—Mr. Dickie's were English tons.

The WITNESS.—The French always use the French tons; that is about $1\frac{1}{2}$ per cent lighter.

(Testimony of H. P. Frear.)

Mr. CAMPBELL.—Q. What percentage of the whole weight of the ship would that be?

Mr. HENGSTLER.—Oh, anybody can figure that out.

A. Anybody can figure that. Mr. Dickie has a slide and let him figure it. [368]

Mr. CAMPBELL.—I am not a mathematician.

Q. Can you give it to us approximately?

A. Let Mr. Dickie do it; he has a slide rule there.

Q. We want you to do it.

A. I do not admit that these are English tons. I never saw a French ship figured out on English tons.

Q. How do you account for the seams in a ship's bottom opening up?

A. I have not read any of the depositions or any further testimony outside of Mr. Dickie's. I do not know what the conditions were; I do not know what the damage was.

Q. If you had a ship come into port with a loaded cargo and she had her butts opened up so that they necessitated caulking, and she had two or 300 rivets leaking on the bottom, what would be the cause of it?

A. If it were on the bottom plating I would say it was due to bending. If that would not account for it, I would say that the captain touched bottom and never said anything about it.

Q. It could be produced by a strain, could it not?

A. Certainly.

Q. (Mr. HENGSTLER.) A bending strain.

Mr. CAMPBELL.—Q. It could be produced by a

(Testimony of H. P. Frear.)

strain which could be produced by loading the ship so that you would have excess of heavy weights in one part and excess of light weights in another, could it not? A. Well, it would depend on conditions.

Q. It could be done, could it not?

A. If it were sufficient, yes.

Mr. CAMPBELL.—That is all.

Mr. HENGSTLER.—That is all. Does your Honor want this [369] diagram?

The COURT.—No. I am not going into the ship-building business.

Testimony of William Schirmer, for Respondents (in Rebuttal).

WILLIAM SCHIRMER, called for the respondents in rebuttal, sworn.

Mr. HENGSTLER.—Q. What is your business?

A. Stevedore.

Q. How much experience have you had in the stowage of sailing vessels?

Mr. CAMPBELL.—Just a moment. Mr. Hengstler, are you calling this witness to answer any of the scientific matter that Mr. Dickie produced?

Mr. HENGSTLER.—No.

Mr. CAMPBELL.—Then I object to the reopening of this case for the purpose of calling stevedores.

Mr. HENGSTLER.—There was expert testimony of captains given here,—captains who have lived around the bay here for about ten years, captains who have not been going to sea at all. They were called for the purpose of showing that the stowage

(Testimony of William Schirmer.)

was improper. I am calling experts for the purpose of showing that it was proper.

Mr. CAMPBELL.—But we tried that feature of the case. My understanding was, if your Honor please, that this matter was continued for the purpose of giving Mr. Hengstler an opportunity to answer the scientific matter Mr. Dickie produced. This is going back to a retrial of the case.

Mr. HENGSTLER.—I have the right to rebut your testimony.

The COURT.—I understood that you desired to take some testimony in a foreign country and that then the case would be closed. You may open it again, if you desire, as you have the witnesses here.

[370]

Mr. CAMPBELL.—I understood he was to answer the testimony given by Mr. Dickie.

The COURT.—That is the way I understood it.

Mr. HENGSTLER.—I do not desire to offer any testimony, if your Honor please, that your Honor does not understand I have the right to offer.

Mr. CAMPBELL.—I have not come here with my records at all to take the testimony of this witness.

The COURT.—You may present the testimony of the witness.

Mr. HENGSTLER.—Q. How much experience have you had in the stowage of sailing vessels?

A. Just the loading and the stowing of vessels, you mean? You do not mean how long I have known and handled vessels. About 14 years' experience with deep water vessels.

(Testimony of William Schirmer.)

Q. How many French vessels have you discharged in that time? Just about how many? I just want a general idea.

A. I could not tell you exactly without looking at the record, but I suppose on an average 6 or 7 a year, maybe; something like that; 5 or 6.

Q. Do you know the French bark "Duc D'Aumale"?

A. Yes, I discharged her on her arrival here.

Q. You discharged her the last time she arrived here? A. Yes, sir.

Q. What did she carry at the time?

A. She had coke and pig iron.

Q. The testimony shows that she arrived with 2,660 tons of cargo, 1,900 tons being in the lower hold and 760 in between decks; 2,000 tons of her cargo were coke and 660 tons were pig iron. Of the pig iron, 60 tons were in the between-decks and 600 tons in the lower hold, this latter 600 tons being in the [371] lower hold in the following way: They consisted of one body immediately aft of the main hatch, occupying a space about 65 feet long—between 63 and 65 feet long, 29 feet wide at one end toward the stern and 36 feet at the other end; the height of the pile was $3\frac{4}{5}$ feet; the pile covered an area of somewhat more than 2,000 square feet; all the rest of the space, except the 60 tons of pig iron in the between-decks, was filled up with coke. I ask you whether, in your opinion, the stowage of those 600 tons of pig iron in the hold was good stowage?

Mr. CAMPBELL.—Just a moment.

(Testimony of William Schirmer.)

Q. Have you ever had any experience in stowing that kind of cargo?

A. No, sir; we do not load that kind of cargo here.

Mr. CAMPBELL.—Then we object to the question, if the Court please. The witness is not qualified as an expert.

The COURT.—It may go into the record for what it is worth.

Mr. HENGSTLER.—He might have a criterion upon which he goes.

A. I am not a builder.

Q. What is your opinion?

A. Well, if it was my ship I would load her that way, if she needed it to be trimmed. You know those vessels usually need the weight aft to trim them, especially when they only have a small amount of weight like that, 600 tons. That is only a small amount of weight in a vessel of that size, and they have to distribute it to trim her.

Q. You have seen other vessels loaded with similar cargo, have you not, that arrived here in San Francisco?

A. Oh, yes; sure. I have discharged them. When they have only 500 or 600 tons, they usually have it together that way. They spread it out as far as it will go, 3 or 4 feet high, in the aft ends of those vessels. Of course, I do not know anything [372] about the construction of ships, you know.

Q. But in the case of ships of the type of the “Duc d’Aumale” that you have observed and you have seen, and which you have unloaded, you find that the

(Testimony of William Schirmer.)

stowage is similar, is it not, with that kind of weight?

A. With amounts not over that in weight. If they have more weight than that, of course, they distribute it may be more forward; they generally keep it pretty compact. They spread it out all over, not leaving any spaces between—as a rule.

Q. In a case where the weight is 600 tons, you think that is not too large?

A. Not if it is in one end, no, not if it is spread out in that distance. Of course, the captains usually load the vessels you know, and they know what they want. He is the best authority on those things always.

Q. The person who is familiar with the vessel and has loaded her in the past is the best authority?

A. That is my experience. The captain always loads the ship.

Q. Is it possible to load a ship with which you are not familiar, and of which you had not known anything about the way she behaves with particular cargoes, could you load her properly the first time—if you are given a cargo of pig iron and coke?

A. No. According to my knowledge, and the way the captains explain it, they acted differently. Some vessels want weight in the lower hold; some want it distributed in the between-decks. That is my experience. The captains generally tell you that. They tell you how they want the weight, and how much, and where they want it.

Q. What does it depend upon as to where it should go?

(Testimony of William Schirmer.)

A. Some vessels are stiffer than others. Some claim they need the weight on top to keep them from rolling. Others want [373] it below. Especially that is so with sailing ships; they claim they roll and throw themselves around if not properly loaded. The captain is the only one who knows that part of it.

Q. Do you know the "Tillie E. Starbuck"?

A. Well, I have known her only by seeing her once. I think she was built around 1880 or 1882, or somewhere about that time. I think she was about the first steel or iron vessel built in the United States—a sailing ship. I do not think she was then much of a success according to my reading about her; I don't know much about her, though. She made long voyages and so on. She looked somewhat different from other vessels, from the outside.

Q. Was she different in type from the "Due d'Aumale"?

A. She appeared entirely different to me, according to my recollection. That is a long time ago. I was before the mast myself at the time and I know we talked about it. We did not think much of her looks.

Q. Did you know the bark "Silberhorn"?

A. No.

Cross-examination.

Mr. CAMPBELL.—Q. You were never master of a vessel carrying coke or pig iron, were you?

A. No.

Q. Were you ever master of a vessel? A. No.

Q. All you know about the stowage of cargoes is

(Testimony of William Schirmer.)

the experience you have had here in San Francisco?

A. No. I have been to sea. It is 40 years ago when I first went to sea before the mast, in wooden vessels. They were American ships. I got up to be first officer when I quit. I went as pilot down the Southern Coast.

Q. Were you ever in charge of the stowage of a sailing vessel? [374]

A. No, we only loaded with grain.

Q. Were you ever in charge of the stowage of a vessel when you were going to sea?

A. No, I was only before the mast in sailing ships.

Q. Your experience with the stowage of cargo in sailing ships has been confined to San Francisco?

A. Yes, sir.

Q. And that is the loading of homogeneous cargo, barley or wheat?

A. Yes. Of course, we have loaded steamers with different cargoes here.

Q. I am talking about sailing ships now.

A. Yes.

Q. If it was necessary to properly trim one of those sailing vessels, and you had 600 tons of pig iron, and you could place that vessel in proper trim by putting it in a certain position immediately forward of the mizzen mast, you could get exactly the same trim by putting a quantity abaft of the mizzen mast, and a quantity forward of the main mast?

A. Yes, you could split it up; you would have to put it further aft; you could not stop at the mizzen mast. You would have to get the weight aft. You

(Testimony of William Schirmer.)

would simply have to go further, and that is all.

Q. You saw cargoes come in with heavy weight distributed over the bottom?

A. Yes, but those ships that generally have 400 or 500 or 600 tons usually have it aft, and sometimes in between-decks. They are hard ships to get by the stern, the French ships especially.

Q. Sometimes they have it spread all over the bottom, do they not?

A. Yes, if they have enough of it.

Q. How would you account for a ship opening up her butt-seams in the vicinity of the stowage of 600 tons of pig iron?

Mr. HENGSTLER.—I object to the question upon the ground [375] that it is not cross-examination.

Mr. CAMPBELL.—You are producing this man as an expert.

Mr. HENGSTLER.—He is not an expert on everything.

Mr. PAGE.—He is only an expert for you—is that it?

The COURT.—Well, I think he is probably just as expert on that as he is on the other questions.

Mr. HENGSTLER.—He has not said a word on anything except stowage.

The COURT.—No.

Mr. CAMPBELL.—Then you do not want me to examine him on that matter?

Mr. HENGSTLER.—I object to it upon the ground that it is not cross-examination.

Mr. CAMPBELL.—All right.

(Testimony of F. G. Wilson.)

Mr. HENGSTLER.—I don't want you to examine him on anything that is not proper.

Mr. CAMPBELL.—If that is the sort of an expert you have, we will let him go. That is all.

Testimony of F. G. Wilson, for Respondents (in Rebuttal).

F. G. WILSON, called for the respondents in rebuttal, sworn.

Mr. HENGSTLER.—Q. What is your business?

A. I am a stevedore.

Q. How long have you been engaged in the stowing and the discharging of sailing ships? A. 30 years.

Q. Have you discharged any French ships in this port?

A. Yes, quite a number; probably more than anybody else.

Q. You are familiar with the type of the French ships, are you? A. Yes, sir. [376]

Q. All your experience in stevedoring has been in this port, has it not, Captain Wilson?

A. I also did some stevedoring in Yokohama, Japan.

Q. Do you know the French bark "Duc d'Aumale"?

A. I saw her when she was here.

Q. The facts are in this case that the "Duc d'Aumale" carried 2,660 tons of cargo, 1,900 of those being in the lower hold and 760 in the between-decks; 2,000 tons of the cargo were coke and 660 tons were pig iron; the pig iron was in two piles, one small pile of 60 tons, which was in the between-decks. There was a larger pile of 600 tons in the lower hold

(Testimony of F. G. Wilson.)

of the vessel, and that was arranged in the lower hold in the following way: It was laid in one body immediately aft the main hatch, occupying a space of 63 to 65 feet in length, 29 feet wide at one end, at the stern end, and 36 feet at the other end, the height of the pile being $3 \frac{4}{5}$ feet and it covering an area of more than 2,000 square feet; all the rest of the space in the ship was filled with coke. I want to ask your opinion with reference to this kind of stowage, as to whether it was correct stowage, or not.

Mr. CAMPBELL.—Just a moment.

Q. Captain, have you ever loaded vessels of the type of the “Duc d’Aumale” with coke and iron?

A. Hundreds of them.

Q. Loaded them or discharged them?

A. Discharged them.

Q. Have you ever loaded them?

A. No. I have loaded them with canned goods.

Q. I am talking about coke and iron?

A. There never has been any coke and pig iron loaded in this port, not during the 30 years I have been in the stevedoring [377] business.

Q. So you have never done that?

A. I have discharged them.

Q. But you have never loaded them?

A. Never loaded them.

Mr. CAMPBELL.—We renew our objection to the testimony of this witness.

The COURT.—It may be admitted the same as the other testimony.

Mr. HENGSTLER.—A man might get a great deal

(Testimony of F. G. Wilson.)

of valuable knowledge that way.

The COURT.—Well, he can give his opinion; we will determine its weight hereafter.

Mr. HENGSTLER.—Q. What is your opinion with reference to the propriety of the stowage of that coke and pig iron?

A. The 60 tons of pig iron, according to what you state there, I suppose it was put in the between-decks at the last moment to put the ship down to her draught—

The COURT.—Q. He is asking your opinion as to whether it was good stowage. The evidence shows why it was put there. He asked you whether it was good stowage, or not.

A. Yes, sir, I consider it good stowage.

Mr. HENGSTLER.—Q. What reasons have you for your opinion, Captain?

A. Well, the French vessels of the type of the “Duc d’Aumale,” and in fact nearly all are French vessels, their upper structure is very heavy; consequently they require a good deal of dead weight in the bottom so as to keep them on their feet, so as to give them stability. If you take the British vessels of the same tonnage as the “Duc d’Aumale,” her upper structure would not be—in other words, the tonnage above deck would not be probably within 60 per cent of what [378] the “Duc d’Aumale” or vessels of her type have. The reason of so much upper structure is for the French vessels to get a bonus from the government.

Q. And that necessitates a different loading for

(Testimony of F. G. Wilson.)

the purpose of making good stowage?

A. It naturally requires more dead weight in the bottom.

Q. What is the strongest part of a vessel, Captain?

A. Right from the after part of the main hatch, in a three-masted ship, to the fore part of the after hatch, or the after part of the after hatch.

Q. Is that the part where you put the heaviest part of the cargo?

A. No, not necessarily. It all depends on the nature of the cargo that the ship is loading.

Q. In this particular case the pig iron was in that strongest part, was it not?

A. It was put there on account of getting the vessel in trim. From the after part of the main hatch forward, of course the vessel widens out there. If you did not have your dead weight aft the vessel would go by the head.

Q. Captain, is it possible to load a vessel safely without being acquainted with her, without knowing how she behaved with similar cargoes in the past?

A. I should say, so, yes, as long as a man of experience who knows anything about a ship does it. There is a difference, of course, between all classes of sailing vessels, iron, wood and steel.

Q. They all have to be loaded differently, do they?

A. They all have to be loaded differently.

Q. What elements have to be considered in loading a ship, making a difference in stowage of the same cargo? [379]

A. Well, take for instance an ordinary iron ship;

(Testimony of F. G. Wilson.)

it would be two-thirds in the lower hold and one-third in the between-decks, whereas you will find some of these sailing vessels that instead of having 60 per cent or 65 per cent in the lower hold, they have as much as 80 per cent. There was a ship here recently, the "William T. Lewis," formerly the "Robert Duncan"; her lower hold had to be packed full with wet cargo; whereas in some other vessels it would be singled down in both ends. But she has her lower hold always filled right up. That is the same with all the vessels of those builders, the Duncans of Glasgow.

Q. What is that due to, the deviation of the rule?

A. It is due to the construction of the vessel.

Q. The construction of the vessel; what do you mean by that?

A. To the construction of the vessel and also to the way she is sparred.

Q. You mean the proportion of length and breadth?

A. No, on account of the way she is sparred. All of those ships have iron masts and iron yards.

Q. In other words, there is no general rule that fits all ships in loading?

A. No, sir; there is no stereotype rule for loading iron or steel vessels, or certain classes of vessels.

Q. Do you know the "Tillie E. Starbuck"?

A. I saw her when she was here; I never was on board of her.

Q. How did she compare with the "Duc d'Aumale"?

(Testimony of F. G. Wilson.)

Mr. CAMPBELL.—I submit that the witness cannot answer that question. He never was aboard of her.

Mr. HENGSTLER.—Q. Was she a vessel of the same type, or different types? That is all I want to know. [380]

A. She was of a different type altogether. The “Starbuck” is an iron ship and the “Duc d’Aumale” is a steel vessel.

Q. Did you know the “Silberhorn”?

A. Do I know the “Silberhorn”?

Q. Yes.

A. I discharged and loaded her 3 or 4 times, or superintended it.

Q. How does she compare in type with the “Duc d’Aumale”?

A. The “Silberhorn” is an iron vessel, or was an iron vessel.

Q. And as to her lines, was she built on similar lines or different lines?

A. Different lines entirely.

Cross-examination.

Mr. CAMPBELL.—Q. What is the difference in the lines between the two vessels?

A. Well, the “Silberhorn” did not have as much upper structure, as many houses on the deck, as the “Duc d’Aumale.”

Q. Is that a difference in lines?

A. Another thing is—

Q. (Intg.) Is that a difference in lines?

A. The “Silberhorn” was an iron ship, and the

(Testimony of F. G. Wilson.)

model or the type is different altogether from the French ship.

Q. What is the difference?

A. Well, for instance, the "Silberhorn" carried her bearings further aft than what a French ship does. A French ship is narrower. They carry their deadrise further forward.

Q. You could get the same stability with the pig iron piled over the entire bottom of the ship as if it were piled in one lump, could you not? A. Yes.

Q. As a matter of fact, the lower you get the pig iron the greater the stability, is it not? [381]

A. Yes. Of course that is a question. The captains of ships who have sailed the vessel for any length of time have various ideas where the dead weight should be put in a ship. We have an instance here on the coast which is self-explanatory. There is a ship here called the "Star of Bengal"; when she was owned under the English flag they used 400 tons of ballast to move her around the harbor with and 900 tons of ballast to go to sea with. Since we own her here in San Francisco she will stand up with 200 tons of ballast and go to sea with 600. Her spars are identically the same. There was no alteration in the ship at all. It is simply the temerity of the master. He has confidence in what his vessel will do.

Q. One time that ship rolled her topmast out of her, did she not? A. Which ship?

Q. The "Star of Bengal"?

A. Well, any vessel would do that if she had too much dead weight in the lower hold.

(Testimony of F. G. Wilson.)

Q. Too much stability?

A. Too much stability, yes. She will roll to windward in a heavy sea.

Q. There has been a great deal of trouble with these French vessels, coming in, with damaged cargo, has there not?

A. With the French vessels, yes. Oh, Lord, yes; especially when the French first started building these vessels in France; they passed that law giving French vessels a bounty. They just threw them together, you know. The result was that they tore themselves all to pieces.

Q. So there has been a very rapid deterioration in that class of vessels generally?

A. A very rapid deterioration. In late years the Frenchmen are beginning to handle their vessels fairly well; they are improving considerably.

Q. And that deterioration was a deterioration in the structure [382] of the vessel, was it not, due to the working?

A. Well, I guess it was due to the fact that the vessel was not properly riveted together.

Q. And a great many of them dropped out their rivets and opened their butts? A. Yes.

Redirect Examination.

Mr. HENGSTLER.—Q. When you speak of rapid deterioration you refer to a former time, do you not? You do not mean to say that the French vessels, since they began building them, have been getting worse and worse?

A. No, no. I mean that when they first started in

(Testimony of F. G. Wilson.)

to build these vessels, everybody was in a great hurry to get them constructed; the result was they were not properly constructed. But vessels that were built 3 or 4 years after the rush, they were put together better.

Q. Do you know when the "Duc d'Aumale" was built—what year?

A. I really could not tell you unless you had Lloyd's here.

Mr. HENGSTLER.—Mr. Campbell, will you admit that Lloyd's reports the "Duc d'Aumale"—

The WITNESS—I think she was one of the first built.

Mr. HENGSTLER.—No, she was built in 1900.

The WITNESS.—In 1900, or some time around there; I think it was in 1900 the bounty law was passed in France; I think it was somewhere about then.

Q. But you do not know that, do you?

A. I do not remember. I know that the firm that I was connected with, I know we have handled the bulk of the French vessels.

Mr. CAMPBELL.—Q. It was with the vessels that were built around about that time that they had so much trouble, was it not? [383]

A. Well, along in 1903 or 1904 we had several of them come in here that were in pretty bad condition.

Q. But it was the vessels that were built around about 1900 that they had the trouble?

A. That were built about 1900, yes.

Q. And from your observation you found that they

(Testimony of F. G. Wilson.)

rapidly deteriorated because of the way they were constructed?

A. Well, they were not properly built and they tore themselves all to pieces. Another thing which made matters worse, to get captains and officers for those vessels was a pretty hard thing; the Frenchmen did not know how to handle them, the job was too big for them.

Q. And they put in boys 25 or 27 years of age, did they not?

A. Oh, a boy 25 years of age! I know a young man who brought the "John T. Perry" out here from New York when he was 19.

Q. That was many years ago, was it not?

A. Oh, I don't know about that.

Mr. HENGSTLER.—Q. Captain Wilson, you do not mean to say that your remarks here apply to the "Duc d'Aumale," do you? You do not know those things about the "Duc d'Aumale," do you?

A. No, no.

Mr. CAMPBELL.—His remarks apply to just what they mean, and that is all.

Mr. HENGSTLER.—Q. You do not know any of these facts about the "Duc d'Aumale," do you?

A. No, sir. I merely say that there were a lot of French vessels that came here, vessels that were constructed immediately after the law was passed giving them a bounty, there were a lot of them poorly constructed. I do not know what year the "Duc d'Aumale" was built in; I do not remember; I never handled her. [384]

(Testimony of F. G. Wilson.)

Q. There were some that were well constructed, were there not?

A. Oh, Lord, yes. A. D. Boards of Paris, one of the largest French owners, all their ships were magnificent ships. It was only a few of these local vessels, a lot of new ship owners sprung up. The old stereotype ship owner, like A. D. Boards, and one or two more, their vessels were all properly built. It was only these new fellows that wanted to rush vessels to the front in a hurry so that they would get advantage of this bounty, those were the vessels that were poorly constructed.

Q. You do not count the "Duc d'Aumale" in that class, do you, from your knowledge?

Mr. CAMPBELL.—Do not lead your witness in that way.

A. I do not know who she was owned by.

The COURT.—Q. And you do not know who built her?

A. I don't know who built her; no, sir. I know that she looked to me to be a mighty fine vessel when she came alongside the wharf. I remember that I was sitting in my buggy at the time when she came alongside the wharf, and she looked to me to be a pretty fine looking ship.

Testimony of H. R. Young, for Respondents (in Rebuttal).

H. R. YOUNG, called for the respondents in rebuttal, sworn.

Mr. HENGSTLER.—Q. What is your business?

(Testimony of H. R. Young.)

A. I am in the stevedoring business and Secretary of the California Stevedoring & Ballast Company.

Q. How long have you been in that business?

A. I have been in the stevedoring business around 30 years.

Q. What experience have you had in the stowage or discharge of sailing vessels?

A. Well, I have had considerable experience [385] in stowage and discharging of all kinds of sailing vessels; that is, loading out of here and discharging from all ports of the world.

Q. Mr. Young, I will show you a copy of the stowage plan of the French bark "Duc d'Aumale," which is in evidence, and I will ask you this question: The "Duc d'Aumale" carried 2,660 tons of cargo, of which 1,900 were in the lower hold and 760 in the between-decks; 2,000 tons were coke and 660 were pig iron; the pig iron was stowed in two piles, one a small pile of 60 tons in the between-decks and 600 tons in the hold, as marked on the stowage plan; the 600 tons of pig iron were placed as follows: they were placed in one body immediately aft of the main hatch, occupying a space about 65 feet long, 29 feet wide at the stern end and 36 feet at the end toward the center of the ship; the height of the pile was about $3\frac{4}{5}$ feet, and the pile covering an area of more than 2,000 square feet; all the rest of the vessel was filled up with coke. I will ask you whether or not in the experience which you have derived in the stowage of vessels and the discharge of vessels simi-

(Testimony of H. R. Young.)

larly loaded, if you can tell whether this is good stowage.

Mr. CAMPBELL.—Just a moment. Q. Mr. Young, have you had any experience in loading vessels with coke and pig iron?

A. I have had experience in loading them with iron, which is as light as that cargo. That experience came in transferring it from one boat to another, and sending it on to Honolulu; also we loaded for New York considerable scrap iron, and then wool and lighter stuff on top of the iron.

Q. But you have had no experience in loading vessels of this character with a combination of coke and pig iron? A. No.

Mr. CAMPBELL.—We will have the same objection, your Honor. [386]

The COURT.—Very well. Answer the question.

Mr. HENGSTLER.—Q. What is your opinion as to it being good stowage?

A. Well, I do not see any objection to that stowage. I think it is all right. I do not think there is any more weight in that spot than there would be with any other dead weight cargo or homogeneous cargo in the same place.

Q. And how about the 600 tons, would you consider that excessive?

A. No, I do not think so, not in that place there.

Q. Do you know of cases where there was more weight than that of heavy cargo in the hold of a vessel carried as ballast or carried as cargo?

A. Well, I am pretty sure we loaded a lot of steel

(Testimony of H. R. Young.)

ships since the fire from here to New York and we have had considerable scrap iron in them, and I am pretty sure there has been that much weight in that area lots of times—as much as that.

Q. Would that be the natural place in which to put pig iron in that vessel?

A. Well, for this reason; that the man that stowed that ship knew he had just so much pig iron and he wanted to put his pig iron so he could fill up the balance of the ship, and fill her up. In the aft end of the ship the capacity is always less than at the forward end, and he wanted to put that there so as to get as much weight in the after end as possible.

Q. Do you see any reason why stowage of that nature would exercise a greater strain upon the vessel than stowage in other places?

A. Well, I have always taken it for granted that a vessel is built to take that weight there. I do not know anything about the construction of vessels particularly, but practically I have always taken it for granted that it would stand at least that much weight there. I know I have [387] put that much weight in all kinds of ships.

Cross-examination.

Mr. CAMPBELL.—Q. You never loaded any iron in those French sailing vessels for New York, did you? A. No.

Q. You are not a practical seaman, are you?

A. I am a practical stevedore. I have never been to sea for a living.

(Testimony of H. R. Young.)

Q. I say you are not a practical seaman yourself; you have never been to sea yourself?

A. No, sir; not as a sailor.

The COURT.—Have you any other witnesses?

Mr. HENGSTLER.—No, your Honor.

Mr. CAMPBELL.—I would like to recall Mr. Dickie for a moment.

The COURT.—Very well, recall him.

**Testimony of David W. Dickie, for Libelant,
(Recalled).**

DAVID W. DICKIE, recalled for libelant.

Mr. CAMPBELL.—Q. Mr. Dickie, you have heard the testimony given this afternoon by Mr. Frear?

A. Yes, sir.

Q. What, if anything, have you to say in answer to it? Is there anything you desire to say?

A. I would emphasize the fact that Mr. Frear, with one of those smiles for which he is famous, evaded the very question which Mr. Campbell asked about the local effect of the shearing force upon the bottom of the vessel. I should like to have had an opportunity to check up these weights, to get the exact difference into the record between my weights which were taken from the formulas upon which these ships were designed, and the actual weights of the ships as given by the French shipbuilders.
[388]

Q. What can you say of his criticism of your buoyancy curves?

A. Mr. Frear gave a very good description of my

(Testimony of David W. Dickie.)

work there, with the exception that he said that these things did not appear to him to be right. There is one fact which I wish to bring out, and that is that if these calculations were not correct the line of shearing force, which is the heavy black line, and which begins at one end of the ship as represented by the diagram, would not come out at the other end if the calculations were not correct. If there is any error in the calculations the shearing force curve would not come out at the end of the base line, the end of said base line representing the length of the ship on the waterline. With regard to the bowsprit which Mr. Frear mentioned, it is quite easy to see that the very end of a ship at the last outermost point has no weight at all. You will notice that my curve of weight, as representing the weight of the ship, has an ordinate at the end. The meaning of this ordinate at the end is that I have taken the weight of the bowsprit and the overhang of the bow and the curve, so that these weights are included in the weight of ship curve, which is plainly marked on the drawing as weight of ship. Likewise with the stern, the overhang has been included and producing an ordinate on the weights of the ship curve at the after end.

Q. Will you mark the stern ordinate "Stern" and the bowsprit ordinate "Bowsprit"?

A. I have indicated on the drawing that the ordinate includes the weight of the bowsprit and the bow weight; and the ordinate at the stern includes the overhang of the stern weight; otherwise the weight of the ship curve would come down to a zero point

(Testimony of David W. Dickie.)

at the end of the base line at each end. If Mr. Frear [389] had checked up my buoyancy curve and my weight curve he would have found that my buoyancy curve is very close to the weight curve, there being a slight difference caused by my buoyancy curve being figured by Tchebyscheff's rule; the weight curve was figured by Amsler's Integrator. The difference between these two curves is caused by the coefficient of the integrator, and this coefficient has been taken care of in constructing the shearing force curve. The entire cargo of the ship is resting on the bottom of the ship. The particular shearing force given here applies to the ship as a whole, but as all of the strains have to be taken by the bottom of the ship, due to the fact that the cargo rests on the bottom, I illustrated the strain on the bottom by means of this shearing force curve. The quantities of shearing force were purposely omitted as this curve is for a ship of the type of the "Duc d'Aumale" and is not an actual curve for the "Duc d'Aumale." The difference in weight between the "Duc d'Aumale" as given by the French builders and the English builders, is as follows: the French builders have given the weight of the ship as 1396.-615 French tons; transferring that into English tons gives about 1415 tons, as near as I can read it on the slide rule. You will see that this is extremely close to the weight of the ship as I have given it in my evidence before. The percentage of error, as compared with the total weight of a ship and her cargo, is extremely small.

(Testimony of David W. Dickie.)

Q. Is there anything that Mr. Frear has said that in any way changes your opinion regarding the shearing force produced by the stowage of those 600 tons?

A. Nothing Mr. Frear has said changes my opinion about the [390] shearing force produced on the bottom of the vessel by the location of the 600 tons of pig iron in one body. Mr. Frear illustrated the shearing force by two pieces of cardboard. I wish to illustrate wherein the shearing force as applied to the "Duc d'Aumale" does not agree with the testimony which he gave. We will assume that these two pieces of paper which I have, the upper one representing the deck and the lower one representing the bottom of the ship, the particular shearing force which Mr. Frear was trying to illustrate was the shearing force of the ship as a whole; whereas, the shearing force that I have discovered as causing the damage in this ship, in my opinion, is caused by the cargo of the ship producing a shearing force in the bottom of the ship, locally at one point, or as the case here, in three points, and did not affect the deck in any way. This cargo damage, as given in the evidence, in my opinion, bears out the calculations that I have made.

Q. In your judgment, Mr. Dickie, would it have required much of a shearing force to have opened the butt-seams and caused the rivets to have leaked?

A. In my opinion it would not require an extreme shearing force to do that. The shearing force that would cause the butts to leak and open the seams

(Testimony of David W. Dickie.)

and give trouble with the rivets is well within the safe shearing force which the structure of the ship as a whole would stand with perfect safety.

Cross-examination.

Mr. HENGSTLER.—Q. Mr. Dickie, is this a new theory of yours, this theory of shearing force?

A. No, sir, that theory is as old as the subject of naval architecture. [391]

Q. If some celebrated writers on navel architecture hardly mention shearing force, but have whole chapters on bending force, and the influence of bending forces upon vessels, would not that indicate that the shearing force is a negligible quantity in accounting for damage to the plating?

A. Not at all.

Q. What is that fact due to, that you do not find anything on shearing force in the technical works, but that they are full of bending forces?

A. You will find a great deal about shearing forces in technical works if you look in the right technical works to find them. The reason that the bending moment has so much attention paid to it is that the whole early ships were dependent upon calculations for the bending moment to govern their early design. The early naval architects, like Scott Russell and those famous men, designed the ships and figured out the bending moment on three conditions; one on the wave, one on the crest of the wave, and one in still water. This gave them a figure which became a matter of data. They then tried all kinds of different figures for this bending moment. They

(Testimony of David W. Dickie.)

kept putting on more and more bending moment on the ship until they got to the point where they began to fail. That gave them what we call a safe bending moment for ships in the North Atlantic, where you find the worst conditions you have to contend with. You will notice that the Lloyd line tables compel you to draw less water and have more freehold in the winter in the North Atlantic than in any other part of the world. This, however, is independent from the local shearing force which caused the trouble in this [392] vessel, in my opinion.

Q. Oh, you know what caused the trouble with this vessel, do you? Do you know that that vessel was lying on shore for three months half submerged?

A. I have been so informed.

Q. Nevertheless, you think the pig iron is what opened the butts?

A. I think the trouble in this vessel is what caused her to put ashore. If she had been properly loaded when she left she would not have had to put ashore at all.

Q. That is from what you were told?

A. That is my judgment.

Q. That is from what you were told, is it not?

A. Well, that is from reading the evidence in the case, as given by—

Q. (Intg.) Did you read the whole evidence in the case?

A. No, I mean only the reports.

Q. Do you know the work of White on Naval Architecture?

A. Yes.

Q. That is a very authoritative work, is it not?

(Testimony of David W. Dickie.)

A. A very distinguished man.

Q. Did you hear the passage that I read to Mr. Frear? A. Yes.

Q. You do not agree with that?

A. I do agree with it. Mr. White there is dealing with a shearing force on the structure of a ship as a whole and not with the application of that shearing force to a particular local member of the ship.

Q. But Mr. White also states, and states it all the way through, does he not, that the shearing force does not exercise upon the horizontal planes of the ship but it finds its exerside [393] against what would be the web of the girder; he illustrates the whole proposition, does he not, by comparing a ship with a hollow girder, calls her a hollow girder, and shows how the bending strains act upon the flange of the girder, the horizontal portions of the girder, and how they spend their force on that, and how the shearing forces spend their force solely—not solely, but chiefly, as Mr. Frear said—99 per cent on the vertical part of the girder. Mr. White is full of that from the first page to the last, is he not, and every other naval architect?

A. Mr. White is perfectly correct in everything he stated, but I wish to make myself clear: Mr. White is dealing with the total shearing force of the ship as affects the total structure of the ship as a whole. Now, after we have disposed of the effect of this shearing force on the total structure of the ship as a whole we begin to look for the effect upon local parts of the ship of the entire loading of the

(Testimony of David W. Dickie.)

cargo. The fact must be borne in mind that we have the bottom of the ship, for illustration, as a plane upon which is loaded above and an unequally distributed cargo, and which we have below a gradual or the same pressure per square foot load supporting the weight of the cargo and the whole ship. This sets up on the bottom of the ship, independent of the sides, a shearing force due to the excess of weight at one point and the excess of buoyancy at another point to support that weight. This shearing force is transferred through the frames and through the keelsons and the stringers to the other structural parts of the ship. It is transferred through the frames and the floor out to the outside parts of the ship. It is transferred through the [394] keelson fore and aft to the other parts of the ship, the bulkheads and things of that kind. If you have a local weight affecting the bottom of the ship in the effort of straining and transferring that strain out to the outside of the ship, which is put there for the purpose of taking the whole shearing force, as Mr. Frear illustrates, it is in the act of transferring the shearing strain from this local point to the sides of the ship that the ship has failed in this particular case. You have a shearing force right along the center of the ship here due to the loading of the cargo. This shearing force had to be taken care of somewhere. It was transferred by means of the frame out to the sides of the ship, and it was in that transfer that the extra strain was thrown on the plating and the framing in that ship.

(Testimony of David W. Dickie.)

Q. Supposing this pile were raised from the bottom of the ship to between decks, within vertical parallels, just raised up a story, what would the shearing strain be in that case?

A. If this cargo were raised up to the between decks, the weight of the cargo would be transferred—

Q. (Intg.) I mean just the pig iron part?

A. Yes, the pig iron part; the weight of the pig iron cargo would be transferred down through the stanchions which support the beams in the center to the bottom of the ship again; that is to say, the weight as represented by one-half the width of the ship would be transferred down through the stanchions and one-half of the load would be transferred to the sides of the ship direct. In that case you would not have as big a strain on the bottom as you would if the cargo were loaded on the bottom because one-half of the load would be transferred [395] only down through the stanchions and the other half would be transferred directly to the sides of the ship which are prepared to take the shearing force.

Q. How would it be if you put that pile on the weather-deck, within the same vertical lines?

A. Then the stanchions from the weather-deck down to the between-decks, combined with the stanchions from the between-decks down to the hold would make the condition just exactly as I have stated it for the between-decks.

Q. Would the strain in that case upon the bottom

(Testimony of David W. Dickie.)

plating be equal, or less?

A. I think the strain would be less in that case on the bottom plating, and on the bottom plating and about equal to the amount that you would transfer over to the sides of the ship direct by means of the beams and beam-arms.

Q. Have you attempted to construct curves corresponding to those positions, first when it is in the bottom and then in the between-decks and then on the weather?

A. No, I did not have time to do that.

Q. I think if you will do that, Mr. Dickie, you will find you will get the same strain.

A. This curve has nothing to do with the strains on the ship in the sense that you mean. This curve is constructed by means of certain loads and certain weights. After we get the curve constructed, then we analyze to see how these weights and these forces are to be taken care of.

Mr. HENGSTLER.—Well, I will leave this examination now. If your Honor please, there is a personal explanation that I would like to make at this time. I have been criticised, and it seems to me with some effect upon your Honor, for not holding [396] to my original agreement. Nothing has been further from my mind, and it would really grieve me personally very deeply if I thought your Honor had such an idea.

The COURT.—Oh, there was nothing of that kind intended. I simply stated my understanding, that you would probably have some witnesses whose tes-

(Testimony of David W. Dickie.)

timony you might want to take abroad.

Mr. HENGSTLER.—The whole testimony that was taken was to me a surprise, if your Honor please. Right or wrong, I had understood for a year and a half that the case was finished and ready for argument. It was a surprise to me that expert witnesses were called. I wanted to reserve the right most strongly to rebut the testimony of those expert witnesses in everything in which it was material. I came to the conclusion that the stowage affected me and was worth while rebutting—

Mr. CAMPBELL.—Mr. Hengstler, pardon me for a moment; how could you have come to the opinion that we were not going to put in any evidence at all?

Mr. PAGE.—At that time we had not a word of evidence in the case. Did you expect us to let it go by default?

Mr. HENGSTLER.—Well, I know, but the way the case began—

The COURT.—Just a moment. That is all the testimony you have, is it?

Mr. HENGSTLER.—Yes, that is all the testimony.

Mr. PAGE.—Yes, your Honor, that is all.

The COURT.—Let it be submitted.

[Endorsed]: Filed Feb. 6, 1912. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk. [397]

(Title of Court and Cause, and Number.)

Opinion Ordering Decree in Favor of Libelants, etc.
(13,959.)

PAGE, McCUTCHEN & KNIGHT, Proctors for
Libellant.

ANDROS & HENGSTLER, Proctors for Claimant.

MEMORANDUM BY BEAN, D. J.

The facts in this case are as follows: On August 19, 1907, the French bark "Due d'Aumale," a three-masted steel vessel of 1,944 tons register, was chartered by her owners to Meyer, Wilson & Co., to carry a cargo of coke and pig iron from Rotterdam to San Francisco. After she had been examined by experts appointed by the French Consul at Rotterdam and by a representative of the Bureau Veritas and the agents of the owners, and by all of them pronounced in every respect seaworthy, she was loaded with 2,015 tons of coke and 660 tons of pig iron. Six hundred tons of the pig iron was stowed in the lower hold between the after part of the main and the forward part of the after hatch in one body, 63 feet long, $34\frac{1}{5}$ feet high, 36 feet wide at one end, and $29\frac{1}{2}$ feet wide at the other. The vessel left Rotterdam on September 19th, and was towed to Brest, where she arrived on the 22d. She sailed from Brest on the 24th for San Francisco. On the afternoon of the 28th and before she had experienced any unusual or extraordinary sea or weather she began leaking through the hull so badly as to make it necessary to use the pumps for forty minutes each day thereafter to free the ship. She did not put into a port of

refuge for repairs but continued on her voyage, the pumps being worked every day until the 22d of November, when she encountered a storm, and, it being impossible to operate the pumps, and the leak increasing, she was put before the wind for the Falkland Islands and was beached at the Roy Cove on November 22d, where she remained until [398] the 13th day of February following. She was then towed to Port Stanley, taken from there to Montevideo and from Montevideo to Buenos Ayres, where she arrived on the 5th of May. The cargo was discharged and she was placed in drydock at Buenos Ayres for repairs. Upon examination, it was ascertained that one rivet was gone from a point about one meter forward of the mizzen mast and one foot from the keel, and that two or three hundred other rivets were loose and leaking. Her plates near the stern were bent and at other parts of the ship the cement was broken in the butt ends of several of the plates. After being repaired at Buenos Ayers her cargo was again taken aboard, the pig iron being more generally distributed in the hold, and on July 6th she sailed for San Francisco, arriving at the latter place on the 19th of November. Her cargo was badly damaged from sea water and her charterers refused to pay the freight, whereupon the owners commenced proceedings to enforce a lien therefor, and the charterers libeled the vessel on a claim for damage to the cargo. The two actions have been consolidated for the purposes of trial and were tried as one.

The principal issues raised by the pleadings are, first, the seaworthiness of the ship as to hull when

she left Rotterdam, and, second, her seaworthiness as to stowage of cargo when she sailed.

Without referring to the testimony in detail or discussing it at length, it is sufficient to say that I am clearly of the opinion that the vessel was unseaworthy at the commencement of the voyage either because of a defective hull or the improper stowage of her cargo or both. In no other way can the leak which occurred on the 28th of September and her subsequent condition near the Falkland Islands be satisfactorily accounted for. All the witnesses testify that the weather she experienced on the voyage was not unusual or extraordinary but such as was reasonably to be expected on a voyage [399] of that kind.

Where a vessel soon after leaving port becomes leaky without stress of weather or other adequate cause, there is a presumption of fact, or rather an inference from the fact of leakage, that she was unseaworthy at the time she sailed. (The Warren Adams, 74 Fed. 413; The Arctic Bird, 109 Fed. 167; Steamship Wellsesley vs. Hooper, 185 Fed. 733.) But it is argued that this presumption or inference is overcome in this case by proof that the "Duc d'Aumale" was inspected before sailing by competent experts and pronounced seaworthy. I do not think such evidence is conclusive. The inspection was general, largely visual, and not particularly of the parts which proved defective. The testimony of the experts that they made an inspection and found the ship in good condition is, of course, persuasive and often satisfactory evidence to show that the vessel was in fact

seaworthy at the time she sailed, but it is by no means conclusive. If a vessel immediately after sailing should make water rapidly through a hole in her hull in a smooth sea and without adequate cause for the leak being shown, the conclusion would be irresistible that she was defective at the time she sailed, notwithstanding she may have been inspected and pronounced seaworthy by competent and skilled surveyors. (*Carolina Portland Cement Co. vs. Anderson*, 186 Fed. 145.) In such case the necessary conclusion would be that the inspectors had overlooked the defect. The question is always one of fact to be determined from the circumstances of each case. The Court must, after considering all the evidence and the legitimate inferences and deductions to be drawn therefrom, determine as a question of fact whether the vessel was seaworthy or not. From the evidence in this case my opinion is that the vessel in question was not seaworthy in her hull at the time she sailed and that the inspectors did not observe the faulty rivets or defective butts through which the leak occurred. But if [400] I am mistaken in this view, I am forced to the conclusion, in order to account for the leak, that the stowage of 600 tons of pig iron in one body in the hold of the vessel, was, as testified to by many experts, improper stowage and produced an unusual sheering strain on the bottom of the vessel, where it was subsequently ascertained the leak occurred, which loosened the rivets and butt ends and caused *to* vessel to take in sea water. This conclusion finds support in the judgment of the independent surveyors at Buenos Ayres who surveyed the vessel in drydock and advised a more general distribu-

tion of the iron over the ship's bottom, which was done in reloading, and before she sailed for San Francisco.

It is claimed, however, that the ship and her owners are exempt from liability under the third section of the Harter Act because the master proceeded on the voyage after discovering the leak on September 28th and did not put into a harbor of refuge for repairs. But the Harter Act does not exempt a vessel or her owner from liability for damages resulting from unseaworthiness at the commencement of the voyage either in hull or from improper stowage of cargo, and this notwithstanding the vessel has been subjected to a general inspection and pronounced seaworthy by competent experts. (The *Carib Prince*, 170 U. S. 655; The *Silvia*, 171 U. S. 462; The *Sandfield*, 92 Fed. 663; *Corsar v. Spreckels*, 141 Fed. 260; The *Ninfa*, 156 Fed. 512.)

It follows that the libellants, Meyer, Wilson & Company, are entitled to recover for damaged cargo. The usual reference will be made to ascertain the amount thereof.

Findings and judgment may be prepared in accordance with this memorandum, for my signature or that of the presiding judge.

April 12, 1912.

R. S. BEAN,
Judge. [401]

Let a decree be entered in accordance with directions of within opinion.

April 15, 1912.

JOHN J. DE HAVEN,
Judge.

[Endorsed]: Filed April 15, 1912. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk. [402]

(Title of Court and Cause, and Numbers.)

Interlocutory Decree.

The above-entitled causes having been consolidated and the Honorable *D. J.* Bean, Judge of the above-entitled court, after due and regular trial, having rendered his decision therein, holding Herman L. E. Meyer, George H. C. Meyer, Herman L. E. Meyer, Jr., J. W. Wilson and John M. Quale, partners under the style of Meyer, Wilson & Co., to be entitled to recover judgment for damages to cargo, and the Honorable John J. De Haven, Judges of the above-entitled court, having thereafter, on the 15th day of April, 1912, ordered that a decree be entered in accordance with said decision, and directing that an order be entered referring said cause to a commissioner of this court to assess the damages so allowed;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED in accordance with said decision that Herman L. E. Meyer, George H. C. Meyer, Herman L. E. Meyer, Jr., J. W. Wilson and John M. Quale, partners under the style of Meyer, Wilson & Co., do have, and recover, judgment in the above-entitled cause for damage to cargo as in said decision awarded;

IT IS FURTHER ORDERED that said cause be referred to Francis *H.* Krull Commissioner of this court, to hear testimony and assess the said damages in accordance with said decision, and thereafter make

due report of same to this court.

Entered this 18 day of August, 1913.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Aug. 18, 1913. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk.

Entered in Vol. 5, Judg. and Decrees, at page 121.

[403]

(Title of Court and Cause, and Numbers.)

**Report of United States Commissioner on Reference
to Ascertain and Report Amount Due Libelants.**

To the Honorable, the United States District Court
for the Northern District of California, First
Division:

Pursuant to the order made herein referring the above-entitled cases as consolidated, to me as United States Commissioner, to hear the testimony and assess the damages in accordance with the decision rendered April 12, 1912, I have to report that I was attended by the proctors for the respective parties, and the proceedings accompanying this report and made a part hereof, were had as therein set forth.

From the evidence adduced before me it appears that the measure of the damages which will compensate Meyer, Wilson & Co., for their loss, will be the difference between the net amount they would have received for their cargo had there [404] been no accident, and the amount which they did receive as net proceeds from the sale of the damaged cargo, together with interest on the net amount which would

have been received had there been no accident, for the period of eight months, the approximate period the ship was delayed because of the accident; also interest from November 19, 1908, up to and including the date of this report on the amount due on November 19, 1908, the date the ship arrived and which date is taken as the date of settlement, for the purpose of calculating the interest. The freight money due the ship or owners, was withheld by Meyer, Wilson & Co., as a setoff to any damage, and being so withheld, I am of opinion, that they are only entitled to interest from the date of the ship's arrival in San Francisco, on any balance in their favor. Meyer, Wilson & Co., are also entitled to certain items of expenditure made on account of the ship, and also certain fees allowed them under the terms of their contract as agents of the ship.

It appears there was shipped on board the "Due d'Aumale" on account of which damage is claimed the following cargo:

349

COKE: 2015,000 kilos or 1983- ~~2240~~ tons, as evidenced by bill of lading No. 3.

If said cargo of coke
had been delivered at
San Francisco, in
due course and un-
damaged, it would
have had a gross
market value of \$29,247.34

The duty would have been	\$1,763.80	
The freight would have been	13,802.76	15,566.56
		<hr/>
The net value would have been		\$13,680.78
The interest at the rate of 7% per annum on the net value of the cargo for the period of eight months, is.....		638.44
		<hr/>
Total carried forward....		\$14,319.22

[405]

Total brought for- ward as the net value of cargo of coke on ar- rival of ship plus interest thereon.....		\$14,319.22
The coke sold at auc- tion for the gross sum of..	\$14,723.09	
The expenses of the sale were	\$388.00	
The duty paid was..	1659.04	2,047.04
		<hr/>

Net amount realized

from sale.....	\$12,676.05	12,676.05
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The amount due

Meyer, Wilson

& Co. as of Nov.

19, 1908.

 \$ 1,643.17

It is contended that \$348 out of the items for expenses incident to the auction sale of the coke, should not be allowed, I am, however, of the opinion, that all expenses incurred therein were proper and necessary for the sale of the damaged coke. An auction sale fairly conducted being a proper method of determining the value of the damaged coke, the necessary expense incident to the sale, is an item of damage.

It is further contended that a deduction made from the weight of the coke as sold on account of moisture, was excessive. This deduction it appears was made upon the report of competent chemists, and there is no evidence that this allowance was not proper, other than a calculation based on weights whose accuracy is not sufficiently established. It further appears that a satisfactory determination of the moisture in the coke was necessary to bring about a sale, and the price obtained was based upon this determination.

CLARENCE PIG IRON: 263=540/2240 tons
shipped as evidenced by bill of lading No. 1.

If said cargo of pig iron had
been delivered at San Francisco in due course and undamaged, its gross market value would have been.....

\$7,449.71

The duty paid would have been		
.....	\$1,052.96	
The freight would have been...	1,421.50	
The State tolls would have been		
.....	13.15	2,487.61
		<hr/>
The net value would have been..		\$4,962.10
The interest thereon for the		
period of eight months at the		
rate of 7% per annum is...		231.56
		<hr/>
Total carried forward.....	\$5,193.66	

[406]

Total brought forward as the net value of cargo on arrival of ship plus interest thereon.....		\$5,193.66
Meyer, Wilson & Co., received as the proceeds of sale of said pig iron.	\$6,397.50	
The duty paid was..	\$1,052.96	
The State tolls.....	13.15	1,066.11
	<hr/>	<hr/>
Net proceeds of sale	\$5,331.39	
Less net value of cargo on arrival of ship plus interest for delay.....	5,193.66	
	<hr/>	

Amount due the ship

or her owners.... \$137.73

SILICIOUS PIG IRON: 400-2140/2240 tons
shipped, as evidenced by bill of lading No. 2.

If said cargo of pig iron had been delivered at San Francisco, in due course and undamaged, it would have had a gross market value of..... \$11,046.32

The duty would have been\$1603.82

The freight would have been 2165.16

The State tolls would have been.... 20.05 3,789.03

The net value would have been..... \$7,257.29

The interest at the rate of 7% per annum on the net value of this cargo for the period of eight months is.. 338.67

Total net value of cargo on arrival of ship and interest \$ 7,595.96

Meyer, Wilson & Co., received as the proceeds of sale of said pig iron	\$10,497.64
The duty paid was	\$1,603.82
The State tolls were. 20.05	1,623.87
<hr/>	
Net proceeds of sale	\$8,873.77
Less net value of cargo on arrival of ship plus inter- est for delay.....	7,595.96
Amount due ship or her owners	<hr/>
	\$1,277.81

The following items claimed by Meyer, Wilson & Co., are allowed:

Agency fee as provided in charter party	\$ 100
Commission on freight earned as provided in charter party, being 2½% on \$16,560.75	414.02
Disbursements made on account of ship...	516.66
For cable relative to ship's deviation.....	4.29
For extra premium occasioned by ship's deviation, and provided for in charter party	138.79
Cable relative to general average.....	23.86
<hr/>	
Total	\$1197.62

The item for cable relative to auction sale and the item for survey of ship, are disallowed. [407]

Proctor for Meyer, Wilson & Co., at the close of the testimony stated that he would make further claim for 1,000 pounds paid for a salvage service on account of the cargo damaged. No proof was offered as to this claim and no finding is therefore made thereon.

RECAPITULATION.

Amount found to be due Meyer, Wilson & Co., on account of damage to cargo of coke	\$1,643.17	
Amount found to be due Meyer, Wilson & Co., on account of services as agents and expenditures made on account of the ship	1,197.62	
		<hr/>
Total	\$2,840.79	
Balance due the ship or her owners, after deducting the damage due to Meyer, Wilson & Co.:		
On Clarence pig iron.....	\$ 137.73	
On Silicious pig iron.....	1,277.81	
		<hr/>
Total	\$1,415.54	1,415.54
		<hr/>
Balance due Meyer, Wilson & Co.		\$1,425.25
Interest on balance due Meyer, Wilson & Co., from November 19, 1908, to April 19, 1915....		640.17
		<hr/>
Total amount due Meyer, Wilson & Co.		\$2,065.42

I do therefore find and assess the damages due Meyer, Wilson & Co., to be the sum of Two thousand sixty-five dollars and forty-two cents.

All of which is respectfully submitted.

Dated, April 19, 1915.

[Seal]

FRANCIS KRULL,
United States Commissioner for the Northern District of California, at San Francisco.

[Endorsed]: Filed Mar. 23, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Presented in open court and filed by order thereof May 6, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [408]

(Title of Court and Cause, and Number.)

(13,941.)

Final Decree.

The above-entitled cause for the recovery of freight on the cargo of the said French barque "Duc d'Aumale" having been consolidated with that certain and separate cause entitled "Herman L. E. Meyer, George H. C. Meyer, Herman L. E. Meyer, Jr., J. W. Wilson and John M. Quale, partners under the style of Meyer, Wilson & Co., Libelants, vs. The French Barque 'Duc d'Aumale,' etc., Respondent, Compagnie Maritime Francaise, Claimant," and numbered in the records of the above-entitled court as No. 13,959, for the purposes of trial and reference to a Court Commissioner to ascertain damages, and consolidated for no other purpose or purposes; and the said causes so consolidated and not

otherwise having come on regularly for trial; and the property of said libelant's right to freight on the said cargo in the said above-entitled action not being denied or contested; and the defense to said claim for freight being in alleged setoff for damage to said cargo in an amount greater than the sum alleged to be due for freight; and the Court having rendered its opinion and decision holding said claimants above named to be entitled to damages for injuries to said cargo; and that there should be a reference to ascertain the amount of said damages; and having ordered that a decree be entered in accordance with the direction of said opinion; and the Court having thereafter ordered that said cause be referred to Francis H. Krull, Commissioner of this court, to hear testimony and thereafter make due report of the same to this Court in accordance with said decision; and a hearing having been duly had before said Commissioner; and said Commissioner having on the 19th day of April, 1915, found the freight on the said cargo to [409] be the aggregate sum of seventeen thousand three hundred eighty-nine and 42/100 dollars \$17,389.42), but having found the cargo damages due to said claimants under the said decision to be a sum in excess of the said sum constituting the said freight; and exceptions having been taken to the Commissioner's said report, and the said exceptions having come on for hearing before the above-entitled court, and the Court having on the 29th day of January, 1917, filed its order herein overruling said exceptions and confirming said report; and

It thus appearing to the Court that the sum of

money, to wit, the sum of seventeen thousand three hundred eighty-nine and 42/100 dollars (\$17,389.42), constituting the freight payable to said libelant by said claimants on the said cargo is more than offset by the damages for cargo injuries found due to said claimants from said libelants in said above-entitled action;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the said libel is hereby dismissed and that claimants do have and recover their costs incurred herein to be hereafter taxed.

Dated, San Francisco, California, February 26th, 1917.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Feb. 26, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Entered in Vol. 7, Judg. and Decrees, at page 141.
[410]

(Title of Court and Cause, and Numbers.)

Final Decree.

The above-entitled causes having been consolidated and having come on regularly for hearing before the above-entitled court, and the said Court having rendered its opinion and decision herein holding Herman L. E. Meyer, George H. C. Meyer, Herman L. E. Meyer, Jr., J. W. Wilson and John M. Quale, partners under the style of Meyer, Wilson & Co., to be entitled to recover judgment for damages to cargo and

that there should be a reference to ascertain the amount of said damages, and having ordered that a decree be entered in accordance with the directions of said opinion and decision; and the Court having thereafter accordingly entered its interlocutory decree herein ordering, adjudging and decreeing that the said Herman L. E. Meyer, George H. C. Meyer, Herman L. E. Meyer, Jr., J. W. Wilson and John M. Quale, partners under the style of Meyer, Wilson & Co., do have and recover judgment in this cause for damage to cargo as in said opinion and decision awarded, and having ordered that said cause be referred to Francis H. Krull, Commissioner of this court, to hear testimony and assess the said damages in accordance with said decision and thereafter make due report of the same to this Court; and a hearing having been duly had before said Commissioner, and said Commissioner having, on the 19th day of April, 1915, found and assessed the damages of the said above-named partners to be the sum of one thousand, four hundred twenty-five and 25/100 (1,425.25) dollars, together with interest thereon from November 19, 1908, to April 19, 1915, in the sum of six hundred forty and 17/100 (640.17) dollars a total of two thousand and sixty-five and 42/100 (2,065.42) dollars; and exceptions having been taken to the Commissioner's said report, and the said [411] exceptions having duly come on for hearing before the above-entitled Court, and the Court having, on the 29th day of January, 1917, filed its order herein overruling said exceptions and confirming said report and ordering that a decree be entered accordingly in

favor of the said Herman L. E. Meyer, George H. C. Meyer, Herman L. E. Meyer, Jr., J. W. Wilson and John M. Quale, partners under the style of Meyer, Wilson & Co., for two thousand two hundred forty-two and $72/100$ (2,242.72) dollars, being for the sum of one thousand four hundred twenty-five and $25/100$ (1,425.25) dollars, found to be due them on November 19, 1908, with interest thereon from that date to said January 29, 1917, amounting to eight hundred seventeen and $47/100$ (817.47) dollars:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said libelants, Herman L. E. Meyer, George H. C. Meyer, Herman L. E. Meyer, Jr., J. W. Wilson and John M. Quale, partners under the style of Meyer, Wilson & Co., do have and recover from Compagnie Maritime Francaise the sum of two thousand two hundred forty-two and $72/100$ (2,242.72) dollars, together with interest thereon from the date of this decree at the rate of seven (7) per cent. per annum until paid, together with the costs of said Herman L. E. Meyer, George H. C. Meyer, Herman L. E. Meyer, Jr., J. W. Wilson and John M. Quale, partners under the style of Meyer, Wilson & Co., herein incurred, to be hereafter taxed and entered herein, in the sum of three hundred two and $50/100$ (302.50) dollars.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if this decree shall remain unsatisfied for ten days after entry thereof and notice to proctors for the said Compagnie Maritime Francaise, the stipulators for costs and value on the

part of said *Compagnie Maritime Francaise*, to wit, Fidelity and Deposit Company of Maryland, shall unless an appeal be taken from this decree within the time prescribed by law, and the rules and practice of this Court, cause [412] the engagement of their stipulations to be performed, or show cause within four days why execution should not issue against them, their lands, goods and chattels, according to their stipulation, to enforce the satisfaction of this decree, and if no cause be shown within the time limited, due service having been made on the proctors for the said *Compagnie Maritime Francaise*, a summary decree herein shall be rendered against the said stipulators on their stipulation and the execution issued accordingly.

Dated February 8, 1917.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Feb. 8, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Entered in Vol. 7, Judg. and Decrees, at page 130.
[413]

(Title of Court and Cause, and Number.)

(13,941.)

Notice of Appeal.

Herman L. E. Meyer, George H. C. Meyer, Herman L. E. Meyer, Jr., J. W. Wilson and John M. Quale, Partners Under the Style of Meyer, Wilson & Co. (Claimants), and McCutchen, Olney & Willard, Their Proctors, and to W. B. Maling,

Clerk of the United States District Court for the Northern District of California, First Division.

You and each of you, will please take notice that the libelants in the above-entitled cause hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of the District Court of the United States for the Northern District of California, sitting in admiralty, made and entered in said cause on this 26th day of February, 1917.

Dated March 15, 1917.

ANDROS & HENGSTLER,
GOLDEN W. BELL,
Proctors for Libelants.

[Endorsed]: Filed Mar. 16, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [414]

(Title of Court and Cause, and Number.)
(13,959.)

Notice of Appeal.

To Herman L. E. Meyer, George H. C. Meyer, Herman L. E. Meyer, Jr., J. W. Wilson and John M. Quaile, Partners Under the Style of Meyer, Wilson & Co. (Libelants), and McCutchen, Olney & Willard, Their Proctors, and to W. B. Maling, Clerk of the United States District Court for the Northern District of California, First Division,

You and each of you will please take notice that

the Claimants in the above-entitled cause hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of the District Court of the United States for the Northern District of California, sitting in admiralty, made and entered in said cause on this 8th day of February, 1917.

Dated March 15, 1917.

ANDROS & HENGSTLER,
GOLDEN W. BELL,

Proctors for Claimant.

[Endorsed]: Filed Mar. 16, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [415]

(Title of Court and Causes, and Numbers.)

Assignment of Errors.

Compagnie Maritime Francaise, as libelant in suit No. 13,941, and claimant of the French barque "Duc d'Aumale" in suit No. 13,959, assigns as error in the conclusions, findings, proceedings and decrees of the District Court the following:

1. The District Court erred in ordering and entering a decree dismissing the libel, with costs to claimants in suit No. 13,941.

2. The District Court erred in ordering and entering a decree in favor of libelants, with interest and costs, in suit No. 13,959.

3. The District Court erred in not ordering and entering, in suit No. 13,941, a decree in favor of libelant for the sum of seventeen thousand three hundred eighty-nine and 42/100 dollars (\$17,389.42), with in-

terest thereon at the rate of seven (7) per centum per annum from the 1st day of December, 1908, and costs of suit.

4. The District Court erred in not ordering and entering, in suit No. 13,959, a decree dismissing the libel therein and in favor of claimant for its costs.

5. The District Court erred in holding and deciding that the claimants of the cargo in suit No. 13,941 are entitled to damages for injuries to the said cargo.

6. The District Court erred in finding and concluding that the said bark "Duc d'Aumale" was unseaworthy at the commencement of her voyage either because of a defective hull or the improper stowage of her cargo or both. [416]

7. The District Court erred in not finding and deciding that the said barque "Duc d'Aumale" was seaworthy at the commencement of her voyage in hull.

8. The District Court erred in not finding and concluding that the cargo of the said barque, at the commencement of her voyage, was properly stowed.

9. The District Court erred in finding and concluding that the leak which occurred on the 28th day of September, 1907, and the subsequent condition of the barque near the Falkland Islands, could be satisfactorily accounted for only on the presumption that the vessel was unseaworthy at the commencement of the voyage either because of a defective hull or the improper stowage of her cargo or both.

10. The Court erred in finding and concluding that the inspection of the barque before sailing by competent experts was insufficient to overcome the

presumption of fact, from the fact of leakage that the barque was unseaworthy at the time she sailed.

11. The Court erred in finding and concluding that the alleged presumption of fact, drawn from the fact of leakage, applies to the facts and circumstances disclosed by the evidence in the above-entitled cases.

12. The Court erred in finding and concluding that the vessel was not seaworthy in her hull at the time she sailed.

13. The Court erred in finding and concluding that the stowage of 600 tons of pig iron in one body in the hold of the vessel was improper stowage, in producing an unusual sheering strain on the bottom of the vessel, or otherwise.

14. The Court erred in not deciding that the vessel and [417] her owners are exempted from liability for all damages to the cargo in this case by the Act of Congress approved February 13, 1893, and commonly called the Harter Act.

15. The Court erred in holding and deciding that the Harter Act does not exempt the claimants of the barque from liability for damages resulting from unseaworthiness at the commencement of the voyage, notwithstanding the vessel had been subjected to a general inspection and pronounced seaworthy by competent experts.

16. The Court erred in holding and deciding that the Harter Act did not constitute a legal defense to the claim and suit of the claimants of the cargo against the claimants of the barque.

[Endorsed]: Filed May 9, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [418]

(Title of Court and Cause, and Number.)

(13,941.)

Notice of Filing Cost Bond on Appeal.

To Herman L. E. Meyer, George H. C. Meyer, Herman L. E. Meyer, Jr., J. W. Wilson and John M. Quaile, Partners Under the Style of Meyer, Wilson & Co. (Libelants), and McCutchen, Olney & Willard, Their Proctors.

You and each of you will please take notice that a cost bond on appeal herein has been this day filed in the office of the Clerk of the District Court of the United States for the Northern District of California, and that the said bond is in the sum of two hundred and fifty (250) dollars with the National Surety Company, a Corporation, thereon as surety.

Dated San Francisco, California, March 16, 1917.

ANDROS & HENGSTLER,

GOLDEN W. BELL,

Proctors for Libelant and Appellant.

[Endorsed]: Filed Mar. 17, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [419]

(Title of Court and Cause, and Number.)

(13,959.)

Notice of Filing Cost Bond on Appeal.

To Herman L. E. Meyer, George H. C. Meyer, Herman L. E. Meyer, Jr., J. W. Wilson and John M. Quaile, Partners Under the Style of Meyer, Wilson & Co. (Libelants), and McCutchen, Olney & Willard, Their Proctors.

You and each of you will please take notice that a cost bond on appeal herein has been this day filed in the office of the Clerk of the District Court of the United States for the Northern District of California, and that the said bond is in the sum of two hundred and fifty (250) dollars with the National Surety Company, a Corporation, thereon as surety.

Dated San Francisco, California, March 16, 1917.

ANDROS & HENGSTLER,

GOLDEN W. BELL,

Proctors for Claimant and Appellant.

[Endorsed]: Filed Mar. 17, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [420]

(Title of Court and Causes, and Numbers.)

Stipulation Consolidating Causes.

IT IS HEREBY STIPULATED by and between the respective parties hereto that the records and files of the above-entitled causes may be consolidated for the purposes of preparing an Apostles on Appeal in the said causes and that the said Apostles on

Appeal when so prepared may be used in the appeal of each said causes to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated San Francisco, California, March —, 1917.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Libelants in Case No. 13,959, and Claim-
and in Case No. 31,941.

ANDROS & HENGSTLER,

GOLDEN W. BELL,

Proctors for Libelants in Case No. 13,941, and
Claimant in Case No. 13,959.

[Endorsed]: Filed Mar. 16, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [421]

(Title of Court and Causes, and Numbers.)

**Stipulation and Order Regarding Original Exhibits
and Documents Written in a Foreign Language.**

IT IS HEREBY STIPULATED BY AND BETWEEN the respective parties hereto that in the preparation of the Apostles on Appeal in the above-entitled causes, consolidated in accordance with the stipulation on file herein, that all testimony, depositions, and documents in a language other than English shall be omitted, provided however, that any translations of such testimony, depositions or documents as have heretofore been made for the use of the court shall be retained and constitute a part of the said Apostles on Appeal; and it is further stipulated as aforesaid, that all exhibits introduced in

court by the said respective parties shall be transmitted to the above-entitled court as original exhibits for the said Apostles on Appeal.

Dated June —, 1917, San Francisco, Calif.

ANDROS & HENGSTLER,

Proctors for Appellants.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Appellees.

It is so ordered.

WM. W. MORROW,

Judge.

[Endorsed]: Filed Jun. 14, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [422]

**Certificate of Clerk U. S. District Court to Apostles
on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States of America, for the Northern District of California, do hereby certify that the foregoing 422 pages, numbered from 1 to 422, inclusive, contain a full, true and correct transcript certain records and proceedings, in the causes entitled, *Compagnie Maritime Francaise*, a French Corp., vs. The Cargo of the French Barque, "Duc d'Aumale," etc., No. 13,941, and Herman L. E. Meyer, George H. C. Meyer, Herman L. E. Meyer, Jr., J. W. Wilson and John M. Quaile, partners under the style of Meyer, Wilson & Co., vs. The French Barque, "Duc d'Aumale," etc., No. 13,959, as the same now remain on file and of record in the office of the Clerk of said Court; said transcript having

been prepared pursuant to and in accordance with the Praeceptum for Apostles on Appeal (copy of which is embodied in this transcript), and the instructions of the Attorneys for Appellant herein.

I further certify that the cost for preparing and certifying the foregoing Apostles on Appeal is the sum of One Hundred Fifty-eight Dollars and Five Cents (\$158.05), and that the same has been paid to me by the Attorneys for the Appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 10th day of July, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,
Deputy Clerk. [423]

[Endorsed]: No. 3018. United States Circuit Court of Appeals for the Ninth Circuit. Compagnie Maritime Francaise, a French Corporation, Appellant, vs. Hermann L. E. Meyer, George H. C. Meyer, Hermann L. E. Meyer, Jr., J. W. Wilson, and John M. Quaile, Partners Under the Style of Meyer, Wilson & Company, Appellees. Apostles on Appeals. Upon Appeals from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed July 11, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the United States Circuit Court of Appeals for the
Ninth Circuit*

No. 13,959.

HERMAN L. E. MEYER, GEORGE H. C. MEYER,
HERMAN L. E. MEYER, Jr., J. W. WILSON
and JOHN M. QUALE, Partners Under the
Style of MEYER, WILSON & CO.,
Libelants,

vs.

The French Barque "DUC D'AUMALE," etc.,
Respondent.

COMPAGNIE MARITIME FRANCAISE,
Claimant.

No. 13,941.

COMPAGNIE MARITIME FRANCAISE,
Libelant,

vs.

The Cargo of the French Barque "DUC D'AU-
MALE,"

Respondent,

HERMAN L. E. MEYER, GEORGE H. C. MEYER,
HERMAN L. E. MEYER, Jr., J. W. WILSON
and JOHN M. QUALE, Partners Under the
Style of MEYER, WILSON & CO.,
Claimants.

**Order Extending Time to and Including May 14,
1917, to Prepare Apostles on Appeal.**

Good cause appearing therefor:

IT IS HEREBY ORDERED that the appellants in

the above-entitled causes may have to and including the 14th day of May, 1917, within which time to procure to be filed the apostles on appeal, consolidated in accordance with the stipulation on file herein, and certified by the clerk of the District Court, and that the clerk of the District Court have to and including the said day within which time to prepare and certify such apostles.

Dated April 14, 1917, San Francisco, Calif.

WM. W. MORROW,
Judge of Said Court.

Approved:

McCUTCHEN, OLNEY & WILLARD.

[Endorsed]: Nos. 13,959 and 13,941. District Court of the United States for the Northern District of California. Herman L. E. Meyer et al., Libelants, vs. The French Barque "Duc D'Aumale," etc., Respondents. Compagnie Maritime Francaise, Libelant, vs. The French Barque "Duc D'Aumale," etc., Respondents. Order Extending Time to Prepare Apostles on Appeal. No. 3018. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 14, 1917. F. D. Monckton, Clerk. Re-filed Jul. 11, 1917. F. D. Monckton, Clerk

In the Circuit Court of Appeals for the Ninth Circuit.

No. 13,959.

HERMAN L. E. MEYER, GEORGE H. C. MEYER,
HERMAN L. E. MEYER, Jr., J. W. WIL-
SON and JOHN M. QUALE, Partners Under
the Style of MEYER, WILSON & CO.,

Libelants,

vs.

The French Barque "DUC D'AUMALE," etc.,

Respondent.

COMPAGNIE MARITIME FRANCAISE,

Claimant,

No. 13,941.

COMPAGNIE MARITIME FRANCAISE,

Libelant,

vs.

The Cargo of the French Barque "DUC D'AU-
MALE,"

Respondent,

HERMAN L. E. MEYER, GEORGE H. C. MEYER,
HERMAN L. E. MEYER, Jr., J. W. WIL-
SON and JOHN M. QUALE, Partners Under
the Style of MEYER, WILSON & CO.,

Claimants.

**Order Extending Time to and Including June 14,
1917, to Prepare Apostles on Appeal.**

Good cause appearing therefor:

IT IS HEREBY ORDERED that the appellants
in the above-entitled causes may have to and in-

cluding the 14th day of June, 1917, within which time to procure to be filed the apostles on appeal, consolidated in accordance with the stipulation on file herein, and certified by the clerk of the District Court, and that the clerk of the District Court have to and including the said day, within which time to prepare and certify such apostles.

WM. W. MORROW,
Judge of Said Court.

[Endorsed]: Nos. 13,959, 13,941. In the Circuit Court of Appeals for the Ninth Circuit. Herman L. E. Meyer, et al., Libelants, vs. The French Barque "Duc d'Aumale," Respondent, Compagnie Maritime Francaise, Claimant. Compagnie Maritime Francaise, Libelant, vs. The Cargo of "Duc d'Aumale," Respondent, Herman L. E. Meyer, et al., Claimants. Order Extending Time to Prepare Apostles on Appeal. No. 3018. Filed May 14, 1917. F. D. Monckton, Clerk. Refiled Jul. 11, 1917. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

No. 13,959.

HERMAN L. E. MEYER, GEORGE H. C. MEYER,
HERMAN L. E. MEYER, Jr., J. W. WIL-
SON and JOHN M. QUALE, Partners Under
the Style of MEYER, WILSON & CO.,

Libelants,

vs.

The French Barque "DUC D'AUMALE," etc.,
Respondent.

COMPAGNIE MARITIME FRANCAISE,

Claimant.

No. 13,941.

COMPAGNIE MARITIME FRANCAISE,

Libelant,

vs.

The Cargo of the French Barque "DUC D'AU-
MALE,"

Respondent.

HERMAN L. E. MEYER, GEORGE H. C. MEYER,
HERMAN L. E. MEYER, Jr., J. W. WIL-
SON and JOHN M. QUALE, Partners Under
the Style of MEYER, WILSON & CO.,

Claimants.

**Order Extending Time to and Including July 14,
1917, to Prepare Apostles on Appeal.**

Good cause appearing therefor:

IT IS HEREBY ORDERED that the appellants
in the above-entitled causes may have to and in-

cluding the 14th day of July, 1917, within which time to procure to be filed the apostles on appeal, consolidated in accordance with the stipulation on file herein, and certified by the clerk of the District Court, and that the clerk of the District Court have to and including the said day, within which time to prepare and certify such apostles.

WM. W. MORROW,
Judge of said Court.

[Endorsed]: Nos. 13,959, 13,941. In the United States Circuit Court of Appeals for the Ninth Circuit. Herman L. E. Meyer, et al., Libelants, vs. The French Barque "Duc d'Aumale," Respondent, Compagnie Maritime Francaise, Claimant. Compagnie Maritime Francaise, Libelant, vs. Cargo of Barque "Duc d'Aumale" Respondent. Herman L. E. Meyer, et al., Claimants. Order Extending Time to Prepare Apostles on Appeal.

No. 3018. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 9, 1917. F. D. Monckton, Clerk. Refiled Jul. 11, 1917. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 13,959.

HERMAN L. E. MEYER, GEORGE H. C. MEYER,
HERMAN L. E. MEYER, Jr., J. W. WIL-
SON and JOHN M. QUALE, Partners Under
the Style of MEYER, WILSON & CO.,
Libelants and Appellees,
vs.

The French Barque "DUC D'AUMALE," etc.,
Respondent.

COMPAGNIE MARITIME FRANCAISE,
Claimant and Appellant,

No. 13,941.

COMPAGNIE MARITIME FRANCAISE,
Libelant and Appellant,
vs.

The Cargo of the French Barque "DUC D'AU-
MALE,"
Respondent.

HERMAN L. E. MEYER, GEORGE H. C. MEYER,
HERMAN L. E. MEYER, Jr., J. W. WIL-
SON and JOHN M. QUALE, Partners Under
the Style of MEYER, WILSON & CO.,
Claimants and Appellees.

Stipulation as to Printing Apostles on Appeal.

IT IS HEREBY STIPULATED by and between
the respective parties hereto that in the preparation
of the consolidated Apostles on Appeal in the above-

entitled cases, the title of the court and cause on the various documents shall be omitted and in its place and stead shall be inserted the following: (Title of the court and cause); also all admissions of service or receipt of copy on the said documents shall be omitted; and also all verifications on the said documents shall be omitted and in their place and stead the following shall be inserted: (Verification).

ANDROS & HENGSTLER,

Proctors for Appellants.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Appellees.

It is so ordered:

WM. W. MORROW,

Judge.

Dated San Francisco, Calif.

[Endorsed]: Nos. 13,959, 13,941. In the United States Circuit Court of Appeals for the 9th Circuit. Herman L. E. Meyer, et al., Libelants and Appellees, vs. French Barque "Duc d'Aumale," Respondent, Compagnie Maritime Francaise, Claimant and Appellant. Compagnie Maritime Francaise, Libelant and Appellant, vs. French Barque "Duc d'Aumale," Respondent. Herman L. E. Meyer, et al., Claimants and Appellees. Stipulation.

No. 3018. Filed May 23, 1917. F. D. Monckton, Clerk. Refiled Jul. 11, 1917. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 3018.

HERMAN L. E. MEYER, GEORGE H. C.
MEYER, HERMAN L. E. MEYER, Jr.,
J. W. WILSON, and JOHN M. QUALE,
Partners Under the Style of Meyer, Wilson
& Co.,

Libelants,

vs.

The French Barque "DUC D'AUMALE," etc.,
Respondent.

COMPAGNIE MARITIME FRANCAISE,
Claimant.

COMPAGNIE MARITIME FRANCAISE,
Libelant,

vs.

The Cargo of the French Barque "DUC D'AU-
MALE,"

Respondent.

HERMAN L. E. MEYER, GEORGE H. C.
MEYER, HERMAN L. E. MEYER, Jr.,
J. W. WILSON, and JOHN M. QUALE,
Partners Under the Style of Meyer, Wilson
& Co.,

Claimants.

Stipulation That Interrogatories and Cross-interrogatories Propounded to E. Deddes et al. may be Included in Printed Apostles on Appeal.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the copies hereunto attached constitute the complete and correct interrogatories and cross-interrogatories heretofore propounded in connection with the hearing of the above-entitled causes in the District Court of the United States for the Northern District of California, Division One, in Admiralty, to E. Deddes, Y. de Yonge, A. van Veen and — Hagenryk, all at Rotterdam, Holland, heretofore inadvertently mislaid in the office of the Clerk of the said United States District Court for the Northern District of California, and hence omitted from the Apostles on Appeal as heretofore certified by the said Clerk, and that the said copies hereunto attached may be filed in the above-entitled court and printed as part of the record on appeal.

Dated San Francisco, California, August —, 1917.

ANDROS & HENGSTLER,

Proctors for Appellant.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Appellee.

At a stated term, to wit, the October term, A. D. 1916, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the twentieth day of August, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3018.

COMPAGNIE MARITIME FRANCAISE, a
French Corporation,

Appellant,

vs.

HERMANN L. E. MEYER, GEORGE H. C.
MEYER, HERMANN L. E. MEYER, Jr.,
J. W. WILSON and JOHN M. QUAILE,
Partners Under the Style of MEYER, WIL-
SON & COMPANY,

Appellees.

Order Allowing Filing of Interrogatories and Cross-interrogatories Propounded to E. Deddes et al.

Upon motion made on behalf of Messrs. Andros and Hengstler, proctors for the appellant, in the above-entitled cause, and pursuant to stipulation of proctors for the respective parties, filed August 20th, 1917, and good cause therefor appearing, ORDERED that the interrogatories and cross-interrogatories propounded in connection with the hearing of

the above-entitled cause in the District Court of the United States for the Northern District of California, Division No. 1, in Admiralty, to E. Deddes, Y. de Yonge, A. van Veen and — Hagenryk, all at Rotterdam, Holland, heretofore inadvertently mislaid in the office of the clerk of the said United States District Court for the Northern District of California and hence omitted from the Apostles on Appeal as heretofore certified by the clerk of said District Court, be filed in the above-entitled cause and printed as a part of the Apostles on Appeal.

[Endorsed]: No. 13,959, No. 13,941. U. S. Circuit Court of Appeals for the Ninth Circuit. Herman L. E. Meyers et al., Libelants, vs. French Barque "Duc d'Aumale," Respondent. Compagnie Maritime Francaise, Libelant, vs. Cargo of French Barque "Duc d'Aumale," Respondent. Stipulation. Filed Aug. 20, 1917. F. D. Monekton, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 3018.

HERMAN L. E. MEYER, GEORGE H. C. MEYER,
HERMAN L. E. MEYER, Jr., J. W. WILSON
and JOHN M. QUALE, Partners Under the
Style of Meyer, Wilson & Co.,
Libelants,

vs.

The French Barque "DUC D'AUMALE,"
Respondent.
COMPAGNIE MARITIME FRANCAISE,
Claimant.

COMPAGNIE MARITIME FRANCAISE,**Libelant,****vs.****The Cargo of the French Barque "DUC
D'AUMALE,"****Respondent.****HERMAN L. E. MEYER, GEORGE H. C. MEYER,
HERMAN L. E. MEYER, Jr., J. W. WILSON
and JOHN M. QUALE, Partners Under the
Style of Meyer, Wilson & Co.,****Claimants.****Stipulation for Omission of Original Exhibits from
Printed Apostles on Appeal.**

IT IS HEREBY STIPULATED by and between the respective parties hereto that all exhibits transmitted to the above-entitled court in their original form from the United States District Court for the Northern District of California in the above-entitled causes may be omitted from the printed record, but shall be retained on file by the Clerk of the said above-entitled court for reference, if occasion requires it, by the said Court or the respective proctors herein.

Dated: San Francisco, California, August 20, 1917.

ANDROS & HENGSTLER,**Proctors for Appellants.****IRA A. CAMPBELL,****McCUTCHEN, OLNEY & WILLARD,****Proctors for Appellees.**

[Endorsed]: No. 13,959, No. 13,941. U. S. Circuit Court of Appeals for the Ninth Circuit. Herman L. E. Meyers et al., Libelants, vs. French Barque "Duc D'Aumale," Respondent, Compagnie Maritime Francaise, Libelant, vs. Cargo of French Barque "Duc D'Aumale," Respondent. Stipulation. Filed Aug. 20, 1917. F. D. Monckton, Clerk.

At a stated term, to wit, the October Term, A. D. 1916, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the twentieth day of August, in the year of our Lord one thousand, nine hundred and seventeen. Present: The Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3018.

COMPAGNIE MARITIME FRANCAISE, a French Corporation,

Appellant,

vs.

HERMANN L. E. MEYER, GEORGE H. C. MEYER, HERMANN L. E. MEYER, Jr., J. W. WILSON and JOHN M. QUAILE, Partners Under the Style of MEYER, WILSON & COMPANY,

Appellees.

**Order Granting Motion to Omit Original Exhibits
from Printed Apostles on Appeal.**

Upon motion made on behalf of Messrs. Andros and Hengstler, proctors for the appellant in the above-entitled cause, and pursuant to stipulation of proctors for the respective parties, filed August 20, 1917, and good cause therefor appearing, ORDERED that all the original exhibits transmitted to this Court from the United States District Court for the Northern District of California in the above-entitled cause may be omitted from the printed Apostles on Appeal but shall be retained on file by the clerk of this court for reference, if occasion requires it, by the said Court or the respective proctors herein.

No. 3018

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COMPAGNIE MARITIME FRANCAISE,

Appellant,

VS.

HERMAN L. MEYER, *et al*

Appellees

BRIEF FOR APPELLANT.

LOUIS T. HENGSTLER,

GOLDEN W. BELL,

Attorneys for Appellant.

Filed this.....day of October, 1917.

FRANK D. MONCKTON, *Clerk.*

Filed

0018-121

By.....Deputy Clerk Monckton

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No. 3018

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COMPAGNIE MARITIME FRANCAISE,

VS.

HERMAN L. MEYER, *et al*

Appellant,

Appellees

BRIEF FOR APPELLANT.

I.

Statement of the Case.

On August 19, 1907, appellees chartered the French bark. "Duc d'Aumale" from appellant, her owner, to carry a cargo of coke and pig iron from Rotterdam to San Francisco. Before loading she was surveyed by two experts appointed by the French consul at Rotterdam, also by the surveyor to the Bureau Veritas, and also by the agents of the owner. After all of these had pronounced her in every respect seaworthy, she was loaded with 2015 tons of coke and 660 tons of pig iron. 600 tons of the pig iron were stowed in the lower hold, between the after part of the main hatch and the

forward part of the after hatch, in a pile 63 feet long, $3\frac{4}{5}$ feet high, 36 feet wide at the forward end and $29\frac{1}{2}$ feet wide at the after end. Appellees were the shippers of the cargo at Rotterdam and receivers at San Francisco. The vessel sailed from Rotterdam on September 19th, and was towed to Brest, where she arrived on September 22nd. She sailed from Brest on September 24th for San Francisco. The weather was fair and the sea calm until September 26th when the ship encountered bad weather in which she labored very much (197). On the afternoon of the 28th, when the ship was in latitude $38^{\circ} 28'$ north, $17^{\circ} 14'$ west, sounding disclosed that there were 23 centimeters of water in the hold, and that this water rose steadily at the rate of one centimeter per hour (164), showing a serious leak and necessitating the daily use of the ship's pumps. She did not put into a port of refuge for repairs, but continued on her long voyage to San Francisco via Cape Horn. The pumps were worked every day for nearly two months, until the 22nd of November, when the ship had arrived at $49^{\circ} 37'$ south latitude, and $66^{\circ} 21'$ west longitude (165), in the neighborhood of Cape Horn where storms are the ordinary and expected perils of navigation. On the last mentioned day she encountered the first storm since she had commenced leaking; it then became impossible to operate the pumps, the leak increased and she filled rapidly. The master, finding it impossible to reach

Port Stanley with his sinking ship, made for the Falkland Islands, where the ship was beached at Roy Cove on November 25th. There she remained aground until the 13th day of February following. She was lying in mud about 5 feet deep (172), and there was 14 feet of water in her hold (169). The cargo was submerged for about three months. The ship was finally towed to Port Stanley where she remained until April 5, 1908. From there she proceeded under her own sail to Montevideo, and thence to Buenos Ayres where she arrived on May 5th. There the cargo was discharged and the ship was placed in dry dock for repairs. On examination it was found that one rivet was gone from a point on the starboard side about one meter forward of the mizzen mast, about one foot from the keel, and several other rivets were loose and leaking (179, 180). The plates in the after part were bent, and the cement was broken in the butt ends of several plates. After the ship was repaired in Buenos Ayres, her cargo was again taken aboard, and she sailed for San Francisco on July 6th, arriving there on November 19, 1908.

On arrival the coke cargo was found badly damaged by reason of the salt water saturation. The charterers refused to pay the freight, whereupon the owners commenced proceedings to enforce their lien for the freight. The charterers libeled the ship on a claim for damage to their cargo.

The two actions were consolidated for the purpose of trial and were tried as one.

The propriety of appellant's right to the freight on the cargo was not denied or contested in the action of the owners for the freight (476). The amount of this freight was found by the Court to be the sum of \$17,389.42 (477); but this amount was found to be more than offset by the damages for cargo injuries found due to respondents from appellants. Accordingly a decree was entered dismissing appellant's libel for freight (475), and a final decree was entered in favor of respondents, and against appellants, in the sum of two thousand two hundred forty two $\frac{72}{100}$ dollars (\$2242.72), together with interest at 7% (477, 480), the latter sum being the excess of respondents' damages for cargo injuries over and above the freight due, making proper allowance for interest on the sums involved.

The sole issue raised by the pleadings is that of the *seaworthiness of the ship*, as to hull and stowage of cargo when she left Rotterdam at the beginning of her voyage. If she was then unseaworthy *and* her owners failed to use due diligence to make her seaworthy, the final decree as rendered should be affirmed; if, on the other hand, the ship was seaworthy when she left Rotterdam, or her owners had used due diligence to make her seaworthy, the appellant is entitled to a decree for the full amount of its freight, and the respondents' libel for damages should be dismissed.

II.

Calendar of Events.

For the convenience of the Court we append the following calendar of events bearing upon this case:

1907.	Aug. 19.	Date of charter party.
	Aug. 27.	Survey of ship in drydock at Rotterdam by two experts (Beaudry and Roy) appointed by the French consul.
	Aug. 27.	Survey in drydock by expert Bureau Veritas (Van Veen), with Captain Plisson, Captain Girard, and the foreman of the drydock company.
	Sept. 1/16.	Loaded at Rotterdam.
	“ 17.	Date of certificate of good stowage, Expert de Yonge.
	“ 19.	Sailed from Rotterdam.
	“ 22.	Arrived at Brest, France.
	“ 24.	Sailed from Brest.
	“ 29.	Discovery that ship was leaking.
	“ 29/Nov. 22.	Ship continues on regular course voyage towards Cape Horn.
	Nov. 22.	Violent gale in neighborhood of Falkland Islands. Leak increases and ship begins to sink.
	Nov. 25.	Beached at Roy Cove, Falkland Islands.
	Nov. 25, 1907.	Ship lies beached at Roy Cove, partly submerged.
	Feb. 13, 1908.	
1908.	Feb. 13.	Left Roy Cove for Port Stanley, in tow of tug.
	“ 17.	Arrived at Port Stanley.
	Apr. 5.	Left Port Stanley in tow of tug “Sanson”; then sailed under her own steam for Montevideo.

Apr. 17.	Arrived at Montevideo.
Apr. 17/May 2.	At Montevideo.
May 3.	Left for Buenos Ayres.
May 5/July 18.	In Buenos Ayres, repairing.
July 18.	Sailed from Buenos Ayres.
Nov. 19.	Arrived in San Francisco.

III.

Appellant's Points and Authorities.

It may be helpful to the Court to introduce appellant's argument by a classification of the various cases that may arise governing the responsibility of a ship owner for the ship's cargo where fault on the part of the captain in her navigation is an element. With reference to the question of the carrying ship, and the cause of the damage, the following cases may arise:

Case 1. The ship is in fact seaworthy on leaving port; the owner had used due diligence to make her so; and the cause of subsequent damage to cargo is fault in her navigation.

In that case the shipowner is not liable (Harter Act. sec. 3).

Case 2. The ship is in fact seaworthy on leaving port, although the owner had not used due diligence to make her so; and the cause of subsequent damage to cargo is fault in her navigation.

In that case the shipowner is not liable, seaworthiness in fact being at least as good as due diligence to make seaworthy.

Case 3. The ship is in fact unseaworthy on leaving port, and the owner did not use due diligence to make her seaworthy; and the cause of the damage is the unseaworthiness.

In that case the shipowner is liable, the damage being caused directly by his fault.

Case 4. The ship is in fact unseaworthy on leaving port, and the owner did not use due diligence to make her seaworthy; and the cause of the damage is fault in navigation.

In that case the shipowner is liable for the damage caused by the fault of his servant.

Case 5. The ship is in fact unseaworthy, *but* the owner has used due diligence to make her seaworthy; and the cause of the damage is the unseaworthiness.

In that case the *shipowner is liable*, unless his liability has been reduced by contract to the measure of due diligence (*The Carib Prince*, 170 U. S. 655).

Case 6. The ship is in fact unseaworthy, *but* the owner has used due diligence to make her

seaworthy; and the cause of the damage is fault in navigation.

In that case the shipowner is not liable (Harter Act, sec. 3).

Appellant's contention is that the facts of the instant case bring it either within *Case 1*, or within *Case 6* above outlined.

Appellant's contentions are the following:

- First. The ship was in FACT SEAWORTHY on leaving Rotterdam.
- Second. Assuming that the ship was not in fact seaworthy on leaving Rotterdam, the evidence shows that the owner USED DUE DILIGENCE to make her seaworthy.
- Third. Assuming that the ship was not in fact seaworthy on leaving Rotterdam, but that the owner used due diligence to make her seaworthy, appellant is not liable for the reason that THE PROXIMATE CAUSE OF THE DAMAGE WAS FAULT IN NAVIGATION.

**FIRST. THE SHIP WAS IN FACT SEAWORTHY
ON LEAVING ROTTERDAM.**

1. *Presumption of seaworthiness.* "In the absence of proof to the contrary, a vessel will be presumed to be seaworthy" (*The Chattanoochee*, 173 U. S. 540, 550). Appellant may start, therefore, with the presumption that the barque was in fact

seaworthy at the commencement of her voyage from Rotterdam. This would necessarily assume that the diligence to secure seaworthiness, required by the Harter Act, had been exercised. The burden of proving unseaworthiness as a fact rests upon the party who asserts it, viz. upon appellees. Appellees must not only combat the effect of the presumption of seaworthiness, but must show by a preponderance of evidence that the barque was unseaworthy. The only evidence tending to overcome the presumption of seaworthiness and to show, in favor of appellees, that the damage complained of was caused by unseaworthiness, is the fact that she began to leak on September 29th, nine days after she had sailed from Rotterdam. From this fact the Court below drew the inference that she was unseaworthy at the time she sailed, stating: "Where a vessel soon after leaving port becomes leaky without stress of weather or other adequate cause, there is a presumption of fact, or rather an inference from the fact of leakage, that she was unseaworthy at the time she sailed". Down to this point the balance of evidence is this: Appellees have, as evidence in their favor, this inference of fact; appellant has the presumption of law in favor of seaworthiness. The burden of proof has not, however, shifted from appellees. The inference of fact, drawn in their favor, is some discharge of the burden resting upon them; but if the weight of this inference were considered as exactly equal to the weight of the

legal presumption in favor of appellant, the effect would be that appellees have not sustained their burden of proof, so that a decree should be rendered in favor of appellant. In the absence of further evidence on this issue of seaworthiness the Court might, however, be warranted in making a finding that appellees have successfully discharged their burden of proof; and that the preponderance of proof on this issue is in their favor. It is exactly for this reason that appellant was not satisfied to rest its case upon presumptions and inferences, but made actual proof in the matter of the seaworthiness of the barque (on this subject see *Scrutton, Charter Parties*, page 82, note 3).

2. *Evidence of seaworthiness.* The seaworthiness of a vessel is to be determined with reference to the customs and usages of the port or country from which the vessel sails, the existing state of knowledge and experience, and the judgment of prudent and competent persons versed in such matters. If, judged by this standard, the ship is found in all respects to have been reasonably fit for the contemplated voyage, the warranty of seaworthiness is complied with, and no negligence is attributable to the ship or her owners.

36 Cyc., 249.

A. Seaworthiness of the Hull.

Before the ship loaded her cargo, the French consul at Rotterdam appointed two experts (Le

Roy and Beaudry) to survey her. These experts accepted the appointment, took the oath required by French law, and, on August 27, 1907, made their report (124-126). In addition to the survey of these official experts, the vessel was carefully examined by Plisson, the general inspector of the ships of the company and their stowage, and his assistant Girard; also by the surveyor of the Bureau Veritas who made a survey of the ship for classification purposes (96). It is well known that a classification survey (on which the class of the ship for insurance purposes depends) is more thorough than a survey made merely for the purpose of determining whether the ship is fit for the particular voyage contemplated. The seaworthiness of the vessel was also tested by the employees of the dry dock company. An abstract of the work of these surveyors follows:

Beaudry.

“At the request of the French Consul I was appointed as surveyor on board the ‘Duc d’Aumale’ with Mr. Le Roy, Captain for the world trade. * * * I inspected the deck, masts, hold, ceiling, cement of the bottom and the accessory pumps, as well as re-exchange of the ‘Duc d’Aumale’, and found everything in perfect order. * * * I went on board the ‘Duc d’Aumale’ the 27th August, 1907; together with Mr. Le Roy, Captain for the world trade; and Mr. Girard, overlooker * * *. The result of my examination was that the vessel was in perfect seaworthiness” (146-147).

“I state under oath that I examined all visible rivets in the hull and that I found none of them bad” (cross-examination, 148).

Le Roy.

“After having gone on board, at the request of the French consul, and in the presence of Mr. Girard, overlooker, and Mr. Allemand, world trading Captain, acting by the time as ship’s master, I went down the hold to look and sound attentively the ship’s sides, as well as the frames and stiffeners of all kinds binding the plates between each other and I let work the pumps, which were in good order. * * * The result of the examination was, from every point of view, in favor of the ship, giving me full satisfaction. The ‘Duc d’Aumale’ was in a perfectly state of navigability” (150).

On cross-examination:

“With the help of a hammer, I have sounded inside the vessel all accessible rivets including the hull’s ones. * * * I could not examine all the rivets of this vessel as she had some goods into the hold, but I let shift, on various places, these goods, and I verify that the plates were very dry and felt no trace of rust caused by unstanchied rivets. * * * I have examined these rivets with a hammer and tried in vain to shake them with my hand” (151-152).

Plisson.

“I have surveyed the building of the ‘Duc d’Aumale’ so as of all the other vessels belonging the Compagnie Maritime Francaise and I have followed her returns to Europe every time. I examined her in dry dock and inspected the stowage of her cargoes. * * *”

“During the stay of the ‘Duc d’Aumale’ at Rotterdam I have attentively examined all her parts during three days from 4th to 6th September, as well afloat as in dry dock, in company of Mr. Girard, the internal survey of the hold did not let me discover anything wrong. The frames, bracket plates, beams, floor plates, and cement at the bottom of the hold, as well as the inside riveting were in a perfect state. In dry dock, where the ship survey of the little bottom was passed by Mr. Van Veen, Veritas Agent, Mr. Girard, and dry dock foreman, and me, we found two defective rivets, which were at once renewed; some butts were joined with mastich; the remainder of the hull riveting, butts, was in perfect state. * * * In my opinion, having surveyed the building of the ‘Duc d’Aumale’ and inspected her several times, I dare say that said building was perfect and in a good keeping state on departure from Rotterdam in September, 1907 * * *” (128-130).

Cross-examination:

“The first examination was made by me on the dates of 4th and 5th September when the vessel was afloat. I made the second inspection on dry dock, the 5th and 6th September. * * * I have personally and thoroughly examined all small bottom keel plates and butts, rivets” (137).

Girard.

“I have examined the ‘Duc d’Aumale’ with the greatest attention in all her parts; I found her in perfect state except some defects in the hull and rudder have been repaired in dry dock. * * * The hull has been inspected in dry dock with the greatest care; two defective rivets have been renewed and butts were

filled with putty * * * (140-141). I have accompanied in the examination of the ship in dry dock Messrs. Plisson, Van Veen, Bureau Veritas Rotterdam Agent, and the foreman of the (dry dock company). I have examined the 'Duc d'Aumale' during my stay at Rotterdam and specially the 4th, 5th, and 6th, September, afloat and in dry dock. * * * After a very particular examination, specially of the rivets, I only saw to be made the repairs mentioned in the Sixth Interrogatory, the remainder being in a perfect state" (143).

Van Veen.

"I thoroughly examined and surveyed the hull of the 'Duc d'Aumale' in dry dock at Rotterdam on the 6th of September, 1907, for classification purposes. * * * I examined the whole of the hull of the vessel and in particular the bottom with all butts, seams, and rivets and the rudder. I found the whole after hull in excellent condition with the exception that I found two rivets corroded and they were renewed and the rudder rebushed" (96).

Cross-examination:

"The 'Duc d'Aumale' was lying in a dry dock of the Rotterdam Dry Dock Company when I examined the 'Duc d'Aumale'. I did the whole examination and survey personally on the 6th of September, 1907, in presence of Mr. Plisson, a representative of the owners, and Mr. Van den Berg, assistant manager of the dry dock company. I examined the rivets in the hull and bottom by going along the ship and under the bottom, and it is quite easy to see whether the rivets are sound or not. * * * As surveyor for the Bureau of Veritas, it has been my daily occupation for the past sixteen years to survey and examine hulls and bottoms of iron and steel vessels" (97-98).

Van den Berg.

"I personally always examine all the vessels that come in the Droogdok Maatschappij. Because the 'Duc d'Aumale' was there in September, 1907, according to the books I must have examined her myself. After the books the bottom and hull have been accordingly examined also by my staff of workmen. All the rivets suspected to be bad have been marked and were tested afterwards; two of them were renewed, the rest proved to be sound, * * * As the costs of repairs include a larger profit for our company than dock rent, we always inspect ships very accurately. All defects discovered must have been repaired, because this is always done. * * * I don't remember personally any more whether the 'Duc d'Aumale' at the moment of her departure was seaworthy. As I examined all vessels personally as to the rivets, rudder, plates and the hull, the ship at the moment of her departure must have been seaworthy for a deep sea voyage as far as the hull is concerned" (101-102).

Cross-examination:

"I always personally examine the whole bottom and hull and order my staff to test the rivets and plates which I suspect to be bad. These rivets are tested in the usual way, i. e., by knocking with a hammer. * * * The condition of the rivets can be ascertained by looking at them; this I do always. I order my staff to test all of these which appear to be doubtful" (102-103).

These abstracts from the testimony show that the "Duc d'Aumale" was inspected, before her departure on the voyage, by an unusual number of

competent experts, and was found seaworthy. It may be admitted that, "if a vessel, immediately after sailing, should make water rapidly through a hole in her hull in a smooth sea * * *, the conclusion would be irresistible that she was defective at the time she sailed, notwithstanding she may have been inspected and pronounced seaworthy by competent and skilled surveyors" (Opinion, p. 464). But in this case the circumstances are different. This vessel did not make water immediately after sailing, but nine days after sailing from Rotterdam, and four days after leaving Brest. Before leaking she had run into bad weather. According to one of appellee's own witnesses it was "a moderate gale" (255), with cross seas (256); according to another it was "between fine weather and a moderate gale, with a heavy cross sea" (272), and not the usual weather, but "a little extraordinary" (272). Certainly, under such circumstances, the conclusion is not irresistible that the ship was defective at the time she sailed. The strain produced by a cross sea would reasonably account for the loosening of a rivet in the bottom. The evidence shows that, when the leak first commenced, it was not due to a rivet which had fallen out, but to a slighter cause. It is impossible to fix with certainty the original cause of the leak; but the cross seas recorded cause such pitching and rolling of a vessel as will naturally produce the result which happened in the instant case. Another reasonable

explanation is that the loosening of the rivet was caused by the impact of a floating obstruction.

It is shown in evidence that every reasonable precaution was taken to ascertain if any defective butts or rivets were in existence. It is common knowledge that, if a butt or rivet shows the slightest inclination to be defective, this becomes apparent by a slight rust forming in the vicinity of the part affected. An expert like Van den Berg, looking for indications of defects, cannot fail to detect them. It is also proper to keep in mind the proverbial thoroughness, carefulness and conscientiousness of Dutch surveyors.

When all is done that human care can do it is fair to presume that this ship, when she left on her voyage, had no defects in her bottom, but that the defect which was discovered nine days later was caused by an agency which operated upon the leaking rivet during the heavy weather of September 28th.

In the light of the positive evidence the fact that a leak was discovered nine days later should not be used as a basis for the mere inference that the leak existed in fact nine days before. There are many convincing reasons why ships are not likely to be sent to sea, on a voyage around the Horn, in a leaky condition. And there are very natural, and simple explanations of leaks occurring in the hulls of vessels. Apart from the effect of strains caused by rolling and pitching in heavy

weather, contact with a floating obstruction is a far more probable cause for the loosening of a rivet and consequent leak than the assumption that lives and property would be recklessly exposed to destruction in a ship which is negligently permitted to sail with a hole in her bottom on a long journey through well-known storm centers.

B. Seaworthiness as to Stowage.

The charter-party of the "Duc d'Aumale" is printed in the usual form used by appellees, and required the ship to proceed at Rotterdam to a dock and or river, as Charterers or their agents shall direct, and there load *in the customary manner* from the agents of the Charterers * * * "Vessel to be loaded subject to Lloyds or Board of Trade *usual rules* and restrictions" * * * "Vessel to be properly stowed and dunnaged, and certificate thereof, and of good general condition, * * * to be furnished to Charterers from Lloyd's or other competent Marine Surveyor" * * * Owners agreeing that vessel shall be loaded as carefully as possible and Owners and Captain to be alone responsible for stowage of cargo and trim of vessel * * * ". "The Master is to employ such Stevedore at port of loading as named by Charterers or their Agents, ship paying current rate." * * *

The stevedores being named by the Charterers themselves, it follows that, in so far as the selection of the stevedores is concerned, appellant used conclusively due diligence to make the vessel sea-

worthly as to stowage. Presumably appellees selected and named competent stevedores; at any rate they are estopped from denying that the stevedores who loaded the "Duc d'Aumale" were experienced or competent, and that appellant used due diligence to make her seaworthy as to stowage.

Even though theoretical stowers at San Francisco may discover *ex post facto* reasons why the cargo should have been stowed differently, the principle which governs this question is:

"Where goods are stowed *in the customary way, and according to the best judgment of experienced stevedores*, the fact that, if they had been stowed differently, the injury sustained might have been avoidable does not make the carrier liable * * *."

36 Cyc., 251.

The cargo was stowed by practical experts who were unusually familiar with the stowage of similar cargoes customarily exported from Rotterdam, and these experts followed a judgment born from such experience and based upon the customs of the port.

The burden of proof to establish improper stowage as contributing to the strain upon the vessel, and thereby to the resulting injury to cargo, is upon appellees. There is in the record no evidence sufficient to sustain a finding that the cargo was improperly stowed—much less a finding that improper stowage was the cause of or contributed to the damage to the cargo.

“Stowage, with a view to the proper trim of the vessel and the ease with which it will be able to carry its cargo when at sea, is a matter which calls for the judgment of those under whose supervision it is done. The carrier is only required to exercise reasonable care and skill in stowing the cargo, and the mere fact that if it had been differently distributed, the ship would have been more easy, does not necessarily show that the cargo was negligently stowed, that is, stowed in such a manner as would not have been approved at the time by a stevedore or master of ordinary skill and judgment, knowing the voyage upon which the vessel was about to sail, and the weather and sea conditions which she might reasonably be expected to encounter.”

Judge De Haven in *The Musselcrag*, 125 Fed. 786, 788.

In those cases where the sole injury consequent upon careless stowage would be an injury to the cargo, carelessness on the part of the master in stowing could be more readily inferred than in a case like the one at bar where the immediate effect of the poor stowage would be to strain the vessel, to open her sides, to imperil her safety and that of the lives on board. It is submitted that an assumption that the rivet in this case was loosened by a floating obstacle or some other peril of the sea is less violent than the assumption that its condition after the nine days at sea was due to original negligent stowage. It should also be kept in mind that in this case it is not proved or conceded as a fact that, had the weight of the cargo been distributed differently, the ship would

have been more easy—in fact the master's testimony shows the opposite (186); but even if it were conceded, this would not prove negligent stowage.

The contention of the cargo owners is that the cargo was stowed by the stevedores whom they selected in such a manner as to produce excessive strain on the hull, and, as a consequence thereof, the leak which led to the ultimate disaster.

The 600 tons pig iron were stowed in that part of the vessel's hold where its strength and breadth are greatest; the pile covered a length of 60 feet, between main and after hatch. It had a mean height of about 1 meter 10 centimeter ($3\frac{4}{5}$ feet) (130-131). (Respondent's "Exhibit 7", Stowage Plan, where, however, the stern-most parcel of pig iron in the hold should be 70 tons instead of 270 tons, as erroneously marked.) The rest of the cargo space was entirely filling with coke (130).

The evidence shows that the method of stowage of a ship is dependent upon experience and acquaintance with the particular ship. There are certain rough rules which, generally speaking, fit the average case approximately; but a knowledge of the individual ship, with her idiosyncrasies, her shape, her fineness, etc., is the chief factor that must determine proper stowage in each individual case.

The stowage was performed by stevedores appointed by appellees (and whom the evidence shows to be experts in their business), under the supervision of Captain Plisson, the veteran

inspector of the company, Captain Girard, his assistant, and of Surveyor de Yonge.

The master's own opinion that the vessel was perfectly stowed is based upon "the way in which the ship behaved at sea" (186). No better test could be applied.

Deddes, a marine surveyor of Rotterdam, and member of the Court of the Dutch Board of Trade, who knows the type of vessel to which the "Duc d'Aumale" belongs, and has had experience in loading vessels of this type, expressed it as his expert opinion that the stowage of the vessel was a good and efficient one, and that the ship was seaworthy as far as stowage is concerned (77).

Y. de Yonge, a marine surveyor at Rotterdam, had extraordinary experience with iron and wooden sailing vessels, and had held about 2000 surveys on river and sea-going craft (84), in particular surveys of the stowage of many sailing ships which left Rotterdam after the San Francisco earthquake with coke and pig iron. He was familiar with the construction of the "Duc d'Aumale" and her dimensions generally so far as was necessary for the purpose of stowing the vessel; he issued her stowage certificate and testifies:

"She was perfectly loaded, and as far as concerns the stowage perfectly seaworthy, in fact, the very ship a sailor likes because such a cargo cannot shift and is a minimum risk for burning, as it produces no gases, and the additional pig iron made the vessel stiff enough to carry sail much better than coke alone."

Van Veen, surveyor for the Bureau Veritas, testifies, referring to the method of stowage of the "Duc d'Aumale":

"I know that this method of stowing *was and still is the usual method of stowing vessels of the type of the 'Duc d'Aumale', with such a cargo.* Mr. A. A. Hoogerwerff, who stowed the 'Duc d'Aumale', has had a very large experience of stowing such cargoes in similar vessels, and I am sure that he would not stow such a cargo improperly" (97).

Plisson, the inspector of the company, who superintended the stowing of the cargo, testifies that the stowage, as it was actually made, gave the vessel her proper sheer (trim); that the heavy pig iron was placed in the strongest part of the hold to minimize the strain; that by this distribution the center of gravity was lowered to the proper point and that thereby heavy straining and violent rolling were minimized and the stability increased (130-132).

Referring to the distribution of the coke and pig iron in the ship he says:

"The division was made in accordance with the good stowing and right sense rules concerning our ships, which are all built on the same shapes. Owing to the fine lines, they can't, being empty, stand up without having in the hold a minimum dead weight of 300 tons. In these conditions, when the vessels are loaded with a similar cargo to the 'Duc d'Aumale' one, you can't leave in the hold less than 600 tons pig iron to give them good stability with a full cargo of coke or other like goods
* * *. Two ships of the same dead weight

taking a similar cargo may have a very important difference in their weight division * * *” (133-134).

The testimony of these witnesses is confirmed by Captain George Ledru, the master of a vessel of nearly the type of the “Duc d’Aumale” (56-70), who testifies that in his judgment the vessel was properly stowed.

The testimony of all these practical experts, some of whom were actually engaged in the work of loading the ship, is conclusive upon the question of the proper stowage. The port of Rotterdam, in which the ship was loaded, has a monopoly of the kind of cargo stowed in this kind of ship, and the stevedores and surveyors of Rotterdam have, therefore, unusual experience in the stowage of this kind of cargo in ships like the “Duc d’Aumale”. They base their opinion as to the propriety of the stowage upon this actual experience, and their familiarity with the type and form of this vessel, and upon their knowledge of the effect of stowage upon the stability and the power to steer and manoeuvre the ship in a seamanlike manner. The great object of the practical stower is to fix the center of gravity in a given ship, and this can be determined only by those who have familiarity with the ship and the manner in which she carries different kinds of cargo.

Confronted with this overwhelming testimony by witnesses who possess first hand knowledge of the fact, appellees offer nothing but assumptions and

theories of San Francisco experts, who have no personal knowledge of the “Duc d’Aumale” nor practical knowledge of methods of stowing—least of all those prevailing at the port of Rotterdam; but the loading of a ship by theory and *ex post facto* criticism does not appeal to the common sense on a question which of necessity involves the experience and customary methods of the loading port. Even theory, however, demonstrates that the binding strain, which would have been brought to bear on the hull of the “Duc d’Aumale” would have been far greater had she been entirely loaded with coke equally distributed, instead of being loaded, as she was, because the sagging strain caused by the weight of the heavy pig iron in the hold of the ship is calculated to counteract the strain produced by the coke.

But assuming—for the sake of argument—that the “Duc d’Aumale” was not properly stowed when she left Rotterdam, on account of the distribution of her cargo, it would be difficult to appreciate the contention that such assumed unseaworthiness would make the owner of the ship liable for damage which the cargo suffered in this case. The distribution of the cargo did not affect the cargo itself in any way whatever. The pig iron was safe although the coke surrounded it, and the coke was safe although the pig iron was stowed in the particular place shown by the evidence. The only effect of the assumed improper distribution, claimed by appellees, is a strain upon the ship, as a result of

which the rivets or butts sprung. Granting this effect, the consequences of the improper distribution of the cargo extended to the 29th of September when the rivet in the bottom of the vessel was loosened. The cargo was safe at that time, and remained safe for two months. The damage to the cargo had no causal connection in a legal sense, with the assumed improper distribution. If, on the other hand, we look back from the fact of the damage to its cause, we come to a willful act of the master who, on September 29th, sent his leaking ship on a voyage into rough and dangerous seas instead of returning to the port of departure, or repairing to a port of refuge, as ordinary prudence should have dictated. There were numerous ports to which he could have taken his ship for repairs. It is a well known rule of legal causation that one fact cannot be considered the legal cause of a consequence, separated from it by the independent will of a human agency. In no sense, therefore, could any assumed improper stowage of the "Duc d'Aumale", when she left Rotterdam, be the legal cause of the damage complained of by the appellees.

C. The Presumption of Continued Seaworthiness Applies.

In *The Edwin L. Morrison*, 153 U. S. 199, the vessel took in water through a hole in her side, whereby cargo was injured. The question was, whether the injury was caused by perils of the sea, or by unseaworthiness of the vessel in the inception of the voyage. The Court found expressly:

“It is proper to note that no survey of the vessel was had” (p. 214), and then held:

“If, however, the vessel *had been so inspected as to establish her seaworthiness*, when she entered upon her voyage, then upon the presumption that that seaworthiness continued the conclusion reached [viz., that at the time of the commencement of the voyage, the vessel was seaworthy] might follow, but we are of opinion that precisely here respondents failed in their case” (p. 214).

The rule laid down in this case is, therefore, that where a vessel was inspected before entering upon her voyage and found seaworthy, the presumption is that the seaworthiness continues until her departure from port. It is only where there was no inspection that the vessel must excuse herself if a leak occurs thereafter.

That such is the rule, is stated by Judge Lacombe in his dissenting opinion in *The Warren Adams*, 74 Fed. 413 (C. C. A.), whose language we quote:

“There is nothing in the nature of the disaster, or in the subsequent appearance of the leaky seams, to indicate whether they were or were not well caulked before the voyage began. The rule laid down in the *Edwin I. Morrison* * * * seems to require the ship under such circumstances, to show *that before the voyage there was an inspection* of the part which subsequently gave way, with the known and ordinary tests, to ascertain whether or not it was in seaworthy condition. * * * Since * * * no inspection is proved, the schooner has failed to excuse herself, if the *Morrison* case is to be followed.”

The presumption that a vessel, after she has once been found seaworthy, continues seaworthy until the beginning of the voyage is a presumption of law. On the other hand the rule that, "where a vessel, soon after leaving port, becomes leaky, without stress of weather or other adequate cause of injury, the presumption is, that she was unseaworthy before setting sail" (*The Warren Adams*, 74 Fed. 413) is, as the Court below correctly indicated, not a rule of law, but rather an inference of one fact drawn from another fact. The inference is proper only where no recent inspection of the ship was made, but it does not apply to a case like the instant one where the ship was thoroughly inspected both for classification purposes (96) and for the purpose of ascertaining her fitness for the particular voyage. The cases of *Work v. Leather*, 97 U. S. 379; *The Warren Adams*, 74 Fed. 413; *The Arctic Bird*, 109 Fed. 167, relied upon by appellees as illustrations of the contrary presumption, are all predicated upon the absence of previous inspection. All legal presumptions are predicated upon a definite and limited state of facts. The presumption of continuance applies to every case, where "the vessel had been inspected so as to establish seaworthiness", especially when she continued seaworthy for the first nine days, the last two of which were stormy. The retrospective inference of unseaworthiness at the inception must fail when it comes in conflict with the *fact* upon

which the Supreme Court bases the presumption of the continuance of seaworthiness.

SECOND. ASSUMING THAT THE SHIP WAS NOT IN FACT SEAWORTHY ON LEAVING ROTTERDAM, THE EVIDENCE SHOWS THAT THE OWNER USED DUE DILIGENCE TO MAKE HER SEAWORTHY.

Assuming now, for the sake of argument, that the evidence is not strong enough to show that the ship was in fact seaworthy when she sailed from Rotterdam, but that she had a latent defect which all the different surveyors who inspected her failed to discover, the evidence certainly and clearly shows that the owner used due diligence—and more—to make his ship seaworthy.

Before loading he made a written request to the consul of France at Rotterdam to designate two experts to make a survey of seaworthiness of the ship (124). The consul appointed two master mariners, Beaudry and Le Roy, who surveyed the interior and exterior of the vessel (125). The inspector of the owner's ships, a former sea captain and surveyor of the Nantes Tribunal of Commerce, and a man of vast experience in the surveying and stowage of ships (128) was personally sent to Rotterdam and examined the "Duc d'Aumale" in all her parts, first afloat and later in dry dock (129-137), and discovered two defective rivets in the bottom, which were at once renewed. He distributed the weight of the cargo in the lower

hold and between-deck in accordance with her lines (133), having been thoroughly familiar with the ship since her construction (129). Captain Girard, another inspector of the company's ships, was sent with Captain Plisson to Rotterdam to assist him in the survey (140). He also accompanied the experts appointed by the French consul in their survey and gave them every assistance (142); and did likewise with the survey of the Bureau Veritas (143). In addition to these surveys the owner had a classification survey made by the surveyor of the Bureau Veritas, a thoroughly qualified expert (96). As to the stowage, the evidence shows that the Rotterdam stevedores who made the stowage had very large experience in stowing such cargoes in such vessels (97); that they were appointed by the charterers; that many cargoes similar to the cargo of the "Duc d'Aumale" were stowed in Rotterdam in sailing vessels bound for San Francisco (85), and that, therefore, the Rotterdam stevedores had unusual experience in the stowage of such cargoes in similar vessels. It also appears that a stowage expert of extraordinary experience (Y. de Yonge, 84, 87), familiar with the "Duc d'Aumale" for stowage purposes (85), "arranged the stowage with the master and Mr. Hoogerwerff, who has had very large experience in stowing this class of cargo" (86), and superintended the work of loading with a view to the seaworthiness of the vessel.

In the light of this testimony it is difficult to see what other steps the owner of the "Duc d'Aumale" could have taken to insure the seaworthiness of the ship both as to her hull and the stowage of her cargo. The evidence shows that the owner used an abundance of due diligence to make the "Duc d'Aumale" in all respects seaworthy.

THIRD. ASSUMING THAT THE SHIP WAS NOT IN FACT SEAWORTHY ON LEAVING ROTTERDAM, BUT THAT THE OWNER USED DUE DILIGENCE TO MAKE HER SEAWORTHY, APPELLANT IS NOT LIABLE FOR THE REASON THAT THE PROXIMATE CAUSE OF THE DAMAGE WAS NOT UNSEAWORTHINESS, BUT FAULT IN NAVIGATION.

1. The Proximate Cause of the Damage Was Not Unseaworthiness.

Assuming, but not admitting, that the "Duc d'Aumale" was unseaworthy when she sailed from Rotterdam, and that, therefore, her owner is liable for the proximate damage caused by such unseaworthiness, the question is: What is the proximate result of such assumed unseaworthiness?

The first probable consequence of a defective rivet is that the sea will enter into the hold of the vessel and come into contact with the cargo. If, by coming into contact with cargo, the result is damage to the cargo, the owner of the ship is liable for such damage, it being the proximate or natural result of the failure of the owner to have his ship in seaworthy condition on sailing. Most

cases of cargo damage where shipowners are held liable are cases of this nature—cases where the damage is *caused by the unseaworthiness*. The instant case is, however, different in its nature: If the master had, after discovering the comparatively slight leak, returned to the port of departure or repaired to a neighboring port of refuge, the only consequence of the initial unseaworthiness would have been some damage to the ship, but no physical damage to the cargo carried by the “Duc d’Aumale”. When, on September 29th, after a storm, the ship showed the first signs of trouble, and water was discovered in her bottom, she was off the coast of Portugal, and could easily have reached neighboring ports of refuge. A prudent master, finding himself in the position of the “Duc d’Aumale” on September 29th, could and would have avoided all damage to the cargo by taking his then unseaworthy vessel into a nearby port for repairs instead of continuing his long voyage through seas which every master knows to be stormy and dangerous for an unseaworthy ship. If the master of the “Duc d’Aumale” had been prudent and had taken the natural steps which can be expected of a master of ordinary caution, he would have taken his ship and her cargo into port and would have made repairs before proceeding on his course to the far-off destination. Had he done so, had he done what, in the natural course of events, was expected of him, the damage which later resulted to the cargo would have been

avoided. That damage is not, therefore, caused in a legal sense by any assumed initial unseaworthiness of the ship in the natural and reasonable course of events.

2. The Proximate Cause of Damage Was Fault in Navigation.

Most, if not all, the damage to the cargo was done while the vessel was submerged on the beach at Roy Cove between November 25, 1907, and February 13, 1908. It is probable that sea water reached the cargo between November 22 and November 25, after she had run into the violent gale; but the evidence shows that, from September 29th until November 22nd, the water in the bottom of the ship was controlled by regular pumping twice a day. The question arises: What was the legal or proximate cause of the sinking of the ship on and after November 22nd? The law looks only to the act or omission from which the result follows in direct sequence *without the intervention of a voluntary independent cause*, and permits no further investigation into the chain of events (38 Cyc., 442). As soon as, in going back from November 22nd, a voluntary independent cause is met as a link in the chain of causation, the law goes no further, but considers this voluntary independent cause as *the* efficient cause of the sinking.

It is well settled that where, in going back in the chain of causation, we come upon the responsible

act or negligence of a third person, such act or negligence is considered to be the proximate cause. Applying this test, the cause of the sinking of the "Duc d'Aumale", which began on November 22nd, was the fault of her master, in the navigation of his ship, between September 29th and November 22nd. When he discovered the leak, his long journey had only begun, and he was still in favorable seas and within easy reach of safe ports where he could have found refuge and made repairs. The natural step which a prudent master would have taken under the circumstances was to have directed his course at once to such a port. He had complete control of the ship; her navigation lay within his exclusive judgment and power. If, on September 29th, he had merely failed to return to port, it might be possible to find a plausible excuse for his omission. At any rate his fault would have been negative. But when on each and every day thereafter, for nearly two months, he persisted on his course to the distant destination, exposing his leaking ship, day after day, to the uncertain perils of storms instead of first making his ship seaworthy when he had many opportunities to do so, his conduct may be properly characterized as wilful. And when we consider that he knew all the time that, on every successive day, he was approaching nearer to the seas which would probably be so turbulent as to try the mettle of the staunchest ships, his persistence on the course with an unseaworthy ship was an act of recklessness, repeated

every day and every hour. From the 29th day of September until the day before November 22nd, the master of the "Duc d'Aumale" interposed the deliberate act of a responsible human agent between the final damage to the cargo and an assumed latent defect which his ship may have had on leaving Rotterdam. On every day between September 29th and November 22nd, when the master had an opportunity to shape his course into a port of repairs, he deliberately and recklessly sent his ship nearer to the point where trouble was known to be lying in wait for her and her cargo. The proximate cause of the final damage was, therefore, any of these many voluntary acts of the master. "The proximate cause is the efficient cause, the one that *necessarily* sets the other causes in operation" (*Insurance Co. v. Boon*, 95 U. S. 117, 130). It was the master's act of running deliberately into dangerous seas with a leaking ship that necessarily set in operation the storm of November 22nd and the consequent sinking of the ship.

Starting at the other end and applying the same test to the assumed unseaworthiness of the ship on leaving Rotterdam, it follows that, supposing that she had then a latent defect in one of her rivets, this would necessarily set in operation the leak which occurred on September 29th; in other words, the latent defect was the proximate cause of the *leak*; but it cannot be contended that either the latent defect or the leak necessarily set in operation a sinking of the vessel which occurred two

months later and which could and should have been avoided by proper navigation. In this respect the instant case is entirely different from the cases in the books where vessels spring a leak and at once begin to sink as the natural result of the leaks.

There can be no doubt that the proximate fault of the damage complained of by appellees is not unseaworthiness of the "Duc d'Aumale" (assuming that any existed), but is the positive fault, or rather series of faults, of her master, in directing the course of his wounded ship for months toward a danger which, in the natural course of events, was expected to lie in wait for him, and which he had numerous opportunities to avoid.

3. Hence Appellant Is Exempt by the Harter Act.

A. The master's acts constitute fault in navigation, within section 3.

That the determination of the master to proceed without putting in for repairs was a matter pertaining to the navigation and management of the vessel, within section 3 of the Harter Act, was decided by this Court in the case of *Corsar v. J. D. Spreckels & Bros. Co.*, 141 Fed. 260. In that case the ship "Musselcrag", in attempting to round Cape Horn, sprang a leak in a storm, and her cargo was damaged by the sea water entering into the hold. Her master finally abandoned the attempt to round the Horn, but continued her voyage by way of Cape of Good Hope. When her course was changed, the ship was within reach of Port Stanley, but failed to put in for repairs.

The question arose, whether this failure of the master to sail for the port of refuge and repair the ship before continuing his voyage was a fault or error in navigation or management within section 3 of the Harter Act, and the Court held that it was, saying:

“The question confronting him was primarily and essentially one of navigation—how best, in view of the trying circumstances in which he was placed, to deal with the elements and get his ship, with her crew and cargo, to the place of destination. That his action in determining this question was primarily and essentially one of navigation does not, in our opinion, admit of the slightest doubt.”

In the case of *The E. A. Shores*, 73 Fed. 667, failure of the master to heed the warning of a government light, which indicated the location of a reef, and presuming the entire accuracy of the compass and the course, were held to be faults or errors of navigation within the meaning of section 3. *A fortiori*, in this case, the failure of the master, after his ship was crippled by the leak, to heed the warning of the notorious danger of the seas around Cape Horn, and presuming, against all the rules of chance, his ability to keep his leaking ship afloat through tempests which were to be expected, was a fault of navigation within section 3 of the Harter Act.

In *The Silvia*, 171 U. S. 462, an inside iron shutter to the port in a compartment having no cargo and easily accessible, but which ought to have

been closed in stormy weather, was knowingly left open by the officers before sailing, and no attempt was made to shut it on the approach of bad weather. It was held that the damage from sea water, which entered during the bad weather, resulted from "fault or error in the management of the vessel". There, as in the instant case on September 29th, it could be reasonably foreseen by the master or officers that, on the arrival of bad weather, the cargo would probably suffer. Failure to remedy this condition in the one case by making the ship water-tight on the ocean, where that could easily be done, in the other case by seeking a port of repairs, was a fault in navigation and management.

B. Section 3 exempts appellant from responsibility for the damage.

Section 3 of the Harter Act provides:

"If the owner * * * *shall exercise due diligence* to make the vessel in all respects seaworthy * * * neither the vessel, her owner or owners, agent or charterers shall become or be held responsible for damage or loss *resulting from faults or errors in navigation or in the management of said vessel.*"

It has been held that, where the damage is *caused by the unseaworthiness* (though the defect be latent when the voyage began), the carrier is liable, in spite of having used due diligence (*The Carib Prince*, 170 U. S. 655).

But this does not apply to a case like the present one, where the damage was not caused by unseaworthiness, but was caused by the fault of naviga-

tion. In this case the principle governs which is stated by Judge Shiras in *The Irrawaddy*, 171 U. S. 187, 192, in these words:

“Plainly the main purposes of the act were to relieve the ship owner from liability for latent defects, not discoverable by the utmost care and diligence and, *in event that he has exercised due diligence to make his vessel seaworthy*, to exempt him from responsibility for damage or loss resulting from faults or errors in navigation or in the management of the vessel.”

Where, as in the instant case, the damage results or is caused by fault in navigation, the Act explicitly exempts the shipowner from liability for latent defects (assuming such defects to have been in existence when the voyage began), if the owner has exercised due diligence to make his vessel seaworthy.

Thus Judge Brown, of the Southern District of New York, says:

“The supposition that the Supreme Court has held that in cases where the damage results from the specific causes named in the third section of the Harter Act (faults or errors in navigation, or in the management of the vessel), the owner is still responsible for the absolute seaworthiness of the ship as before, is, I think *mistaken*. I do not find any such adjudication, and the terms of the third section as respects damages, *resulting* from the causes mentioned in it, *are explicit to the contrary*. * * *

In cases where the damage must be deemed to have ‘resulted’, not from any defect in the ship or the condition of the compartments as

the efficient cause of the loss, but from some one or more of the causes specified in the third section as the real and efficient cause, the ship and owner are by the express terms of the act made answerable only for the exercise of due diligence to make the ship seaworthy."

The Manitoba, 104 Fed. 145, 152.

The case of *The Carib Prince*, 170 U. S. 655, was cited by counsel for appellees in the Court below as being in conflict with our contention, but an examination will show that this case does not belong to the category of cases upon which we rely (Case 6 above), but that it is a case where the damage to the cargo is the direct and immediate result of the unseaworthiness of the vessel on leaving port; and it is therefore within the category of the cases we have distinguished as Case 5 above. Even in such cases the owner is exempted if he has used due diligence to make his vessel seaworthy and has reduced his liability by contract.

The case at bar, however, is an entirely different case; for here the proximate cause of the damage is independent of any duty imposed by the Harter Act upon the shipowner. The proximate cause of the damage to appellee's cargo was the aggravated fault of the master of the "Duc d'Aumale" in her navigation.

IV.

Conclusion.

We believe that the evidence shows sufficiently that the ship was in fact seaworthy in every respect

when she sailed from Rotterdam; if there be any doubt as to this contention, the evidence certainly shows conclusively that the owner of the ship used due diligence to make her seaworthy when she started on her voyage. The evidence also shows that the legal cause of the damage to appellee's cargo is the fault of the ship's master in her navigation. It follows that the owner of the ship is relieved from liability for the damage.

The decrees of the Court below should be reversed, and a final decree ordered in favor of appellant for the full amount of its freight, with interest and costs.

Dated, San Francisco,

October 4, 1917.

Respectfully submitted,

LOUIS T. HENGSTLER,

GOLDEN W. BELL,

Attorneys for Appellant.

No. 3018

IN THE 3

United States Circuit Court of Appeals

For the Ninth Circuit

COMPAGNIE MARITIME FRANCAISE (a French corporation),

Appellant,

VS.

HERMANN L. E. MEYER, GEORGE H. C. MEYER,
HERMANN L. E. MEYER, JR., J. W. WILSON, and
JOHN M. QUAILE, partners under the style of
MEYER, WILSON & COMPANY,

Appellees.

BRIEF FOR APPELLEES.

EDWARD J. McCUTCHEN,
IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellees.

Filed this.....*day of October, 1917.*

FRANK D. MONCKTON, Clerk.

By.....*Deputy Clerk.*

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BRIEF FOR APPELLEES.

I.

Statement of the Case.

The French bark "Duc d'Aumale", a steel vessel of 1944 tons register, under charter to Meyer, Wilson & Company, after drydocking and survey at Rotterdam loaded a cargo of 2015 tons of coke and 660 tons of pig iron at Rotterdam to be carried on a voyage around Cape Horn to San Francisco.

She left Rotterdam on September 19, 1907, and towed to Brest, France, where she arrived on September 22d,

and from whence she set sail upon her voyage on September 24th. Thereafter, on the afternoon of September 29th, five days after she left Brest and after she had passed through ordinary squally weather of short duration, 22 centimeters of water were found in the hold, and water thereafter continued to come in at a rate of one centimeter every hour, necessitating pumping regularly 20 minutes each morning and evening.

The vessel continued southward on her voyage toward Cape Horn until, on November 22d, when in latitude $49^{\circ} 37'$ south and in longitude $66^{\circ} 21'$ west, the wind increased in velocity and a high sea was encountered, causing the ship to roll heavily, with the result that the leakage increased but could not be pumped out because the bottom of the pipe at every rolling of the vessel was dry. At 4 o'clock in the afternoon, the wind shifted to the southwest, and thereupon the master wore ship at 8 p. m. Again, on the afternoon of the 24th, the sea continuing, he wore ship, and during this maneuver, when the ship was in an upright position, the carpenter sounded and found one meter and twenty-five centimeters of water in the hold, showing that the water had increased rapidly since morning. Thereupon, the master set one watch to the pumps and, at six o'clock, found one meter and sixty-five centimeters of water in the hold. After consultation with the crew, he resolved to take refuge in the Falkland Islands and so kept the ship off and made for the islands. After she was put before the wind the leakage decreased. She reached Roy Cove late in the afternoon of Novem-

ber 25th and was immediately beached, filling with water until she had 14 feet in her hold.

Thereafter, on February 13, 1908, she was released from her stranding and taken to Port Stanley, leaving there on April 5, 1908, for Montevideo, where she arrived on April 17th. She left Montevideo on May 2d and arrived at Buenos Ayres on May 3d, and was dry-docked and underwent repairs from May 5th to July 18th. As part of the repairs, between two and three hundred loose rivets in her bottom were tightened, and butt seams between the ends of the plating were calked and cemented. The cargo was restowed by distributing the weights of the pig iron more evenly over the bottom of the lower hold instead of leaving it in one block, as originally stowed.

On July 18, 1908, the *Duc d'Aumale* sailed on her voyage for San Francisco by way of Cape of Good Hope, taking the longer route for the purpose of earning bounty.

She arrived in San Francisco on November 19, 1908, with her cargo of coke and pig iron badly damaged, to the loss of Meyer, Wilson & Company in the amount awarded by the District Court. Thereafter suit was instituted by the owner of the vessel against Meyer, Wilson & Company for freight, and by the latter against the vessel for damages to cargo. The cause was tried in January, 1912, before Judge R. S. Bean, sitting in Division No. 1 of the United States District Court for the Northern District of California. Judge Bean subsequently rendered his decision holding that the "*Duc d'Aumale*" was unseaworthy at the commence-

ment of the voyage either because of a defective hull or the improper stowage of her cargo, or both, and directed a decree in favor of Meyer, Wilson & Company. After proof of damages had been made on a reference before Commissioner Krull, a final decree was entered by Judge M. T. Dooling on February 8, 1917, in favor of Meyer, Wilson & Company in the sum of \$2,242.72, together with interest thereon from the date of the decree until paid, and for costs in the sum of \$302.50, said former sum being the excess of the damages to cargo over the freight due thereon. Thereafter this appeal was taken by the owner.

II.

Argument.

THE CAUSE OF THE LOSS WAS THE UNSEAWORTHINESS OF THE "DUC D'AUMALE" IN HER HULL AND IN THE STOWAGE OF HER CARGO.

This is a simple case of injury to cargo resulting from unseaworthiness in the hull of the carrying vessel, due to defects in hull either existing at the commencement of the voyage or developing on the voyage through an improper stowage of the cargo.

The salient facts are that the "Duc d'Aumale" developed a leak in the fairest of sailing weather within five days after leaving port, and thereafter, upon encountering the heavier weather reasonably to be expected in the lower latitudes in the vicinity of Cape Horn, which necessarily caused the vessel to work more in her structure by rolling and pitching in the seas, the

leakage so increased that the master, after consultation with his crew, put his vessel before the wind and sea, whereupon she worked less and the leakage decreased; and finally beached her in Roy Cove, Falkland Islands.

The "Duc d'Aumale" Began to Leak in Moderate Weather Shortly After Commencing Her Voyage Without Encountering Sufficient Cause Therefor.

So clearly does the testimony of the master show that the "Duc d'Aumale" sprung a leak in ordinary weather within five days after she left Brest that we quote it for its description of the conditions under which the unseaworthiness of the "Duc d'Aumale" first developed:

On direct examination, he said:

"MR. HENGSTLER. Q. On what date did the vessel leave Rotterdam?

A. 17th of September, 1907. She was cleared on the 17th, and left Rotterdam on the 19th.

Q. What was the first port at which she stopped?

A. Brest.

Q. Where is Brest? A. In France.

Q. And how long did she remain there, and on what days?

A. She arrived on the 22d at 3 P. M., and left on the 24th at 9 A. M. in the morning.

Q. Now, Captain, will you describe the first parts of the voyage, referring to your log, day after day, with reference to the weather which you encountered?

A. We left Brest on the 21st at 9 o'clock in the morning. There was a small breeze from the north, shifting from the north to west, and we sailed until the 26th of September, and *had fine weather and calm sea*. We encountered westerly winds with a choppy sea.

Q. On what day?

A. The 26th of September. There was a swell until the 28th.

Q. What occurred on the 28th?

A. The wind hauled to the southwest, freshening and increased, the sea coming heavy rapidly. The wind shifted to the northwest on the 28th at 2 o'clock in the morning. The weather cleared up, but the sea became very heavy. We had very violent squalls, especially during the watch from 8 o'clock in the morning until noon. The weather became cloudy again in the afternoon with squalls, the sea being very heavy, direction west, northwest. From 8 P. M. to midnight, the sea was still heavier, and the squalls more and more violent.

Q. Are you still on the 28th?

A. Yes, sir; on the 29th the weather became fine, and the squalls less and less violent, the wind decreasing rapidly, there being still a squall. There were times when the ship was rolling heavily, the sea coming from abeam. *At 4 o'clock in the afternoon, we found the increase of water in the ship's hold. We found 23 centimeters at four o'clock.* We pumped at once, and cleared the water from the hold in a quarter of an hour.

Q. What latitude and longitude was the vessel in on that day, the 29th?

A. 38 degrees, 28 minutes north latitude at noon; 17 degrees, 43 minutes west. The vessel was steering south 35 degrees west.

Q. Now, go ahead and tell what happened next.

A. We saw every day that water was increasing in the hold regularly, about one centimeter every hour.

Q. What did you do with the pumps during that time?

A. *We pumped regularly, morning and evening.* At 7:20 in the morning and 4:20 at night.

Q. For how long a time each time?

A. *About twenty minutes each time.*

Q. Did you succeed in controlling the inflow of the water by this pumping?

A. *By pumping forty minutes, we cleared the water from the hold.*

Q. How long did that go on?

A. Nothing happened particularly until the 22d of November." (Ap. 163-165.)

* * * * *

On cross-examination its master testified and the log book showed the following:

"Q. On what day did you leave Brest?

A. 24th of September.

Q. The weather from the time you left Brest up to the 28th day of September, when the leak was sprung, was as fine weather as it was possible to have at sea, was it not?

A. The two or three first days. After that we had a breeze starting at the west, going to south-west, getting fresh, and shifting to the north-west.

Q. But you had no stormy weather up to that time—up to the 28th?

A. I have not examined the log.

Q. Look at your log, and tell us whether the weather was not the ordinary weather that a sailing vessel encounters without any stormy weather?

A. During the nights of the 26th and 27th we had bad weather.

Q. Describe the weather as it is given in the log.

A. From 8 o'clock to midnight of the 26th we had bad weather.

Q. Is this entry in your log correct: 'From midnight of the 26th to midnight of the 27th, weather squally; nice breeze; swell, *all sails set.*' In the second watch, 'Squally weather, nice breeze; *all sails set.*' In the third watch, 'Squally weather; nice breeze; *all sails set.*' In the fourth watch, 'Squally weather of little strength; a fine breeze; *all sails set.*' In the next watch, 'Squally weather; nice breeze; *all sails set.*' Next watch, 'Cloudy; fine breeze; a few squalls; *all sails set.*' The next day; 'From midnight of the 27th to the midnight

of the 28th.' In the first watch, 'Squally weather; strong rain; the wind blows to the southwest, and shifts to the northwest; *gaff topsail and main-jib torn, royals and upper top-gallant sails and staysails and spanker taken in.*' In the next watch, 'The same kind of weather; strong breeze; a large swell from the northwest; the top-gallant sails taken in; *unbent the main jib*; violent squalls; strong winds; heavy sea; *set the top-gallant sails and mizzen staysail.*' Next watch, 'Cloudy weather and squally; strong breeze; heavy sea from the west, northwest; *the same sail as during the preceding watch.*' Next watch, 'Squally weather; strong breeze; *furled the mainsail at six o'clock.*' Next watch on the same day, 'The same weather; very strong swell; violent squalls.' The next day, 'Midnight of the 28th to midnight of the 29th.' In the first watch, 'Fine weather; some squalls; strong breeze becoming less at the end of the watch.' Second watch, 'Fine weather; fine breeze; *set the mainsail; royal, spanker and staysail.*' In the next watch, 'Fine weather; fine breeze; *all sails set.*' In the next watch, 'Squally weather; the sea falls more and more; *all sails set*; tested the steam gear; *found an increase of water in the hold; sounded 23 centimeters; cleared the pumps.*' In the next watch, 'Fine weather, the breeze softens; *all sails set.*' The next watch, 'Fine weather, light breeze; *all sails set.*'

And on that day did you make any notation in your own handwriting on the log-book with reference to the discovery of water in the hold?

A. Yes, sir; I wrote at the foot of the log not to fail to sound at every watch, and to give an account to the captain; if the water rises slowly and regularly, they must pump in the morning at 7:20 and in the evening at 4 o'clock.

Q. Does that log correctly state the facts as they occurred at the time with reference to the character of the weather? A. Yes, sir.

Q. During all of this time, or any part of this time, was your ship rolling? A. Yes, sir.

Q. Was that the natural roll of an ordinary ship in that kind of weather, or was it an extraordinary rolling?

A. The rolling was caused by this wind which started at the southwest, and shifted to the northwest, the sea having become very heavy by the cross-seas, and when the wind shifted to the northwest, the wind decreased, and the vessel not being stayed by the sails rolled heavily.

Q. Is it not usual if a vessel rolls very heavily, that is more than is expected of her, to make an entry in the log that the ship has been rolling?

A. Generally, but it was neglected.

Q. Was there a laboring of the ship prior to the leak starting, which was unexpected or unusual?

A. Yes, sir; the day after that night, the wind shifted from the southwest to the northwest.

Q. *Was the laboring of the ship upon that occasion very extraordinary?*

A. *The ship labored less than she did later after that storm at the Falkland Islands, but she did labor very much.*

Q. *Is it not usual for any ship to labor more or less in a cross sea without making water?*

A. *Certainly; the 'Duc d'Aumale' itself did it many times, probably, but this time she sprang a leak.*

Q. Then, that must have come from some weakness of the ship before she started, did it not? There must have been some weakness.

A. I don't think so.

Q. *How can you account for the ship springing a leak in weather which was fine, all excepting during one or two days at the most, and that weather not very bad, no storms?*

A. *I cannot give any other explanation.*

Q. *Then the only explanation that you have to give is that the ship strained in this kind of weather, and started a leak. That is the only explanation you can give?* A. Yes, sir.

Q. After the leak was started, how long did the good weather continue?

A. Variable weather, up to the storm that we had in the west of the Falkland Islands.

Q. About what date was that?

A. The 22d of November.

Q. There was no other bad weather, was there, up to that time?

A. We had one small gale in the latitude of Montevideo.

Q. The rest of the time you had fine weather, had you not? A. Yes, sir." (Ap. 194-8.)

There is no claim that the weather was other than the finest from the time of sailing to September 26th. And from then on to the 29th, when the leak developed, while squally, it was weather in which the ship carried full sail, save that in the first watch of the 28th the gaff topsail and main jib were torn and the royals and upper topgallant sails, staysails and spanker were taken in. The topgallant sails were taken in during the second watch, but the main jib was then set again, And before the end of the watch, the topgallant sails and main topsail were set. The mainsail was furled at six o'clock, but, on the morning watch of the following day (the 29th), the mainsail, royal, spanker and staysail were set. Thereafter full sail was again carried. *Not once did they strip her down to storm sails, for even during the second watch of the 28th when she was under her shortest sail, she was carrying her upper and lower topsails and foresail.* Except for that watch she continuously carried her topgallant sails. A ship cannot be under such sail in weather denominated as stormy.

It was, as appears from the following testimony of experienced ship masters, moderate weather, the kind

of weather reasonably to be expected in that locality at that season of the year.

After having had read to him the foregoing description of the weather given by the master of the "Duc d'Aumale," Captain Davison, a master of 29 years' experience, characterized it as follows:

"The weather you have described was from fine weather up to a moderate gale and back to fine weather again, a moderate gale from southwest to northwest,"

and stated that it was the character of weather which might be expected on the voyage in that position (Ap. 251). Captain Manning, a master for 18 years, described it:

"Well, it was between fine weather and a moderate gale, with a heavy cross sea. * * * "

(Ap. 272.)

Captain Fleming, who had been going to sea for 33 years and had been a master for 8 or 9 years, stated that the weather described by the master of the "Duc d'Aumale" was quite usual (Ap. 286). As to it, Captain Eben Curtis, a master of 30 years' experience, testified:

"Q. Captain, I will ask you to state whether or not that weather was in your judgment unusual or unexpected weather, or was it the usual expected weather in that vicinity in that season of the year?

A. *Oh, it was weather you could expect there at that time.*

Q. How would you characterize that weather?

A. As a moderately strong—well, *not much more than a strong breeze; you might say that it was more fresh winds; not heavy at all.*

Q. If you had a well-constructed, well-founded and well-stowed ship, in all respects seaworthy when she left Brest, would you have expected her to have so strained in that kind of weather as to have caused the leakage that the ‘Duc d’Aumale’ suffered from in this case?

A. I should not expect her to strain, or any well-founded vessel to strain in that weather to make her leak.

Q. If a vessel had encountered severe rolling such as might strain her, would you expect an entry to that effect to be made in the ship’s log?

A. It should be.

Q. If you were looking over a log, would you expect to find such an entry if that weather had been encountered?

A. Yes, sir, I would expect that log-book would give a proper description of the weather and anything unusual that occurred.

Q. Would the sea which would be made or created by the weather as detailed on the 26th, 27th, 28th and 29th of September, in your judgment, be a usual or an unusual sea for that vicinity in that season of the year?

A. *Nothing unusual about it.*” (Ap. 294-295.)

And Captain Gibson, who had been to sea for 39 years and a master for 27 years, said with respect to it:

“Now, Captain, I will ask you what your judgment is of the character of weather which was described by the Master in his testimony. Was that the usual, ordinary weather that you might expect or unusual, extraordinary weather?

A. *Just the usual, ordinary weather.*

Q. How would you describe it yourself in your own language, what kind of weather would you call it?

A. *Ordinary weather*, just as it was; it is entered in the log that way. *They never have had their upper top-sails in. The topgallant-sails were furled one night, I think it was.*

Q. If you were starting from Rotterdam or Brest, on a voyage to San Francisco, would you expect to encounter weather of that character in that vicinity?

A. Yes, sir; I should expect to.

Q. Would that weather in your judgment, produce any unusual strain upon the ship?

A. No, sir; it should not.

Q. If that ship had been seaworthy, in all respects sound, well founded, her cargo well and properly stowed, in your judgment would such weather have so strained her as to cause her to have sprung a leak? A. It should not.

Mr. HENGSTLER. That is subject to my objection.

Mr. CAMPBELL. It is so stipulated.

Q. Would the sea that would be created by weather of that character, be an unusual condition of sea or the usual condition as you might expect?

A. *It is the usual condition.*

Q. Is it anything unusual to have water on your decks? A. No, sir." (Ap. 329-330.)

What shall be said of the ship that strained under those conditions, for the only explanation that the master could give of the "Duc d'Aumale's" springing a leak was that she strained in that kind of weather? (Ap. 197). *Nothing can be said other than that she was unseaworthy.* It is too plain for further words. Her hull was not sufficiently tight, staunch and strong to be competent to resist the ordinary action of the seas (*Du Pont v. Vance*, 19 How. 162).

The Springing a Leak of the "Duc d'Aumale" in Moderate Weather Shortly After Commencing Her Voyage Raised the Presumption of Her Unseaworthiness on Sailing.

It is clear that, whatever may have been the character of the survey made of the "Duc d'Aumale" at Rotterdam in August, prior to her loading, the fact remains that she developed, within five days after leaving port, in ordinary sailing weather, a leakage which required the working of her pumps for forty minutes every twenty-four hours to keep the water down. Inasmuch as the vessel had not encountered any weather sufficient to account for her unseaworthy condition, the presumption is raised that she was unseaworthy on sailing.

It was so held by the Supreme Court in

Work v. Leathers, 97 U. S. 379; 24 L. Ed. 1012, wherein the court said:

"If a defect without apparent cause be developed, it is to be presumed it existed when the service began."

And of the presumption, Circuit Judge Wallace, delivering the opinion of the Circuit Court of Appeals for the Second Circuit in

The Warren Adams, 74 Fed. 413, 415, said:

"Where a vessel, soon after leaving port, becomes leaky, without stress of weather, or other adequate cause of injury, the presumption is that she was unsound before setting sail. The law will intend the want of seaworthiness, because no visible or rational cause, other than a latent or inherent defect in the vessel, can be assigned for the result."

The principle was stated by District Judge Thomas in
The Aggi, 93 Fed. 484, 491, (affirmed 107 Fed.
 300),

as follows:

“When a vessel, soon after leaving port, becomes leaky without stress of weather or other adequate cause of injury the presumption is that she was unseaworthy before setting sail” (citing cases).

In

Pacific Coast S. S. Co. v. Bancroft-Whitney Co.,
 94 Fed. 180,

wherein the facts giving rise to litigation were not dissimilar to those in the case at bar, in that the steamship “Queen of the Pacific” was beached at Port Harford to save her from foundering after she had sprung a leak at sea within twenty-four hours after leaving the port of San Francisco, without meeting with any accident or injury or encountering tempestuous or boisterous weather which could have caused the leak, District Judge Hawley, delivering the opinion of this court, said:

“In a proceeding of this character, and under the facts established in this case, the following principles of law are well settled * * *

“*That, although it may be presumed that a vessel is seaworthy when she sails, if soon thereafter a leak is found, without the ship having encountered a peril sufficient to account for it, the presumption is that she was not seaworthy when she sailed.* Higgle v. American Lloyds, 14 Fed. 143, 147; *The Gulnare*, 42 Fed. 861; *Work v. Leathers*, 97 U. S. 379; *The Planter*, 2 Woods 490, Fed. Cas. No.

11,207a; *Cort v. Insurance Co.*, 2 Wash. C. C. 375, Fed. Cas. No. 3,257; *Walsh v. Insurance Co.*, 32 N. Y. 427, 436.” (Italics ours.)

The decision in that case was afterwards reversed by the Supreme Court, but upon an entirely different point, namely, that the claims had not been presented within the time required by valid stipulations in the bills of lading.

In

The Arctic Bird, 109 Fed. 167, 170,

a case arising out of the sinking of a barge in tow from Kotzebue Sound to the head of navigation on the Kubuk River, Alaska. after it had proceeded on a voyage for six hours, Judge De Haven said:

“Seaworthiness has been defined as ‘that quality of a ship which fits it for carrying safely the particular merchandise which it takes on board’ (*The Thames*, 10 C. C. A. 232, 61 Fed. 1014); or, in the language of Baron Parke, to be seaworthy a vessel must be ‘in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it’ (*Dixon v. Sadler*, 5 Mees. & W. 405). And in *Dupont De Nemours v. Vance*, 19 How. 162, 15 L. Ed. 584, the supreme court said: ‘To constitute seaworthiness of the hull of a vessel in respect to cargo, the hull must be so tight, stanch, and strong as to be competent to resist all ordinary action of the sea, and to prosecute and complete the voyage without damage to the cargo under deck. * * *’ *In view of this rule, as to what constitutes seaworthiness, it has been uniformly held that if a vessel springs a leak, and founders, soon after starting upon her voyage, without having encountered any storm or other peril to which the leak can be attributed, the pre-*

sumption is that she was unseaworthy when she sailed. The Planter, 2 Woods, 490, Fed. Cas. No. 11,207a; Talcott v. Insurance Co., 2 Johns. 124, 3 Am. Dec. 406; Cort v. Insurance Co., 2 Wash. C. C. 375, Fed. Cas. No. 3,257; Walsh v. Insurance Co., 32 N. Y. 427; Paddock v. Insurance Co., 11 Pick. 227; Work v. Leathers, 97 U. S. 379, 24 L. Ed. 1012. Thus, in the case last cited, the court said: 'If a defect without any apparent cause be developed, it is to be presumed it existed when the service began.' So, also, in the case of Walsh v. Insurance Co., 32 N. Y. 436, the court observed: 'Where the inability of a ship to perform a voyage becomes evident soon after leaving port, and it founders without stress of weather or other adequate cause of injury, the presumption is that this inability existed before setting sail, and that it is due to some latent defect which rendered the vessel unseaworthy.' The barge, when unloaded and just before the commencement of the voyage upon which it was lost, was towed a distance of 12 miles without leaking. This is relied upon by the petitioners as proof of its seaworthiness, but can be given no such effect in the face of the fact that the barge sunk without having encountered a peril of the sea. In my opinion, but one conclusion can be drawn from the evidence, and that is that the barge was unseaworthy. Its foundering, under the circumstances stated, can only be accounted for upon the theory that it was not strong enough to sustain the strain to which it was subjected by the towage and weight of its cargo." (Italics ours.)

The words of Judge De Haven may well be paraphrased and applied to the "Duc d'Aumale":

"But one conclusion can be drawn from the evidence, and that is that the vessel (barge) was unseaworthy. Its leaking (foundering), under the circumstances stated, can only be accounted for upon the theory that it was not strong enough to

sustain the strain to which it was subjected by the ordinary weather encountered (towage) and weight of its cargo.”

District Judge Wolverton, writing the opinion in

Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co., 162 Fed. 912,

affirmed the principle in the following language:

“It not infrequently transpires that a vessel, after entering upon her voyage or engaging in the service for which she is dispatched, becomes unseaworthy, and damage ensues, without any apparent cause from stress of weather or collision in any way, or undue or negligent abuse in handling and navigating her, and in every such case the presumption obtains that she was unseaworthy at the time of entering upon her service. *How else could her condition be accounted for?*” (Italics ours.)

The principle was recognized by this court in the case of the

Steamship Wellesley Co. v. C. A. Hooper & Co., 185 Fed. 735, 738,

Circuit Judge Gilbert saying:

“We think it clear that the accident, occurring as it did, and as thus described by the master, raises a strong presumption of unseaworthiness.”

The rule was enforced by the Circuit Court of Appeals for the Fifth Circuit in

Carolina Portland Cement Co. v. Anderson, 186 Fed. 145, 147,

wherein it was said:

“We now hold that the *William H. Sumner* was not seaworthy at the inception of the voyage under

the test of seaworthiness as given in The Silvia, 171 U. S. 462-464, 19 Sup. Ct. 7, 43 L. Ed. 241, because the proof is that within a few hours after leaving port, and before encountering any peril of the sea, she sprung a leak from defective butts in the bottom of the vessel; and that, in addition, her steam pump was not in good order and broke down when put in use, and from these circumstances the presumption of unseaworthiness arises." (Italics ours.)

And district Judge Holt in

The River Meander, 209 Fed. 931,

a case of leakage developing on the voyage, stated the rule as follows:

"In my opinion, if a ship is shown to be unseaworthy during a voyage, the inference may be drawn, in the absence of any explanation to the contrary, that she was unseaworthy when she started. Cargo owners usually cannot prove unseaworthiness at the time a voyage begins.

"It is the duty of the shipowner to know that his ship is seaworthy before the voyage begins, and if he does know it he can prove it. If a vessel proves to be unseaworthy during a voyage, the burden should be on the shipowner to prove affirmatively that she was seaworthy at the time the voyage began." (Italics ours.)

The late case of

Benner Line v. Pendleton, 210 Fed. 671,

is in point, for the schooner "Edith Alcott" sprang a leak in the first heavy weather encountered, three days after leaving New York. In holding her to be unseaworthy, District Judge Holt said:

"The respondent has given elaborate evidence to the effect that the ship was kept in very good

condition; that she had been carefully inspected, overhauled, and put in order before the voyage; and that she had a rating with the insurance companies as high as is ever given any vessel of her age. I have no doubt that her owners believed her to be seaworthy. *But facts in such a case speak louder than words, and the facts that she sprang so bad a leak on the first night of heavy weather that occurred upon her voyage, and that there is no adequate explanation given of it, is, in my opinion, not consistent with her being seaworthy at the beginning of the voyage.*" (Italics ours.)

And in affirming the decision, the Circuit Court of Appeals said of the rule:

"While the weather was heavy, there was nothing so extraordinary about it that a ship in a seaworthy condition should not have been able to stand the strain. The fact that the vessel sprang so bad a leak, and that no satisfactory explanation of the fact has been made, indicates to us, as it did to the court below, that the vessel was not seaworthy as to her hull at the beginning of the voyage." (217 Fed. 497, 503.)

Applying the settled rule of law as announced in these cases to the circumstances and conditions under which the evidence shows that the leak in the "Duc d'Aumale" developed, it necessarily follows that the strongest presumption must be raised against the vessel that she was in an unseaworthy condition at the commencement of her voyage. Until sufficient cause other than unseaworthiness is shown to have brought about the leakage, she must stand condemned in the eyes of the law as an unseaworthy vessel, with all of the liabilities attaching thereto.

The Increase in the Leakage Upon Encountering the Heavier Weather to be Expected Off the Falkland Islands Conclusively Established the Unseaworthiness of the "Duc d'Aumale."

The fair weather continued until November 22d, during which intervening period the leak was controlled by the regular pumping of 20 minutes morning and evening. On November 22d, however, the "Duc d'Aumale" then being in 49° 37' south latitude and 66° 21' west longitude, the weather and sea increased, as was to be expected, necessarily subjecting the vessel to greater strains than those experienced either in the moderate weather of September or in the fair weather subsequent thereto. *The result was that the leakage immediately increased* to such proportions that the master, after consultation with the crew, decided to run for the Falkland Islands. The master described the weather and the condition of his vessel during that time as follows:

"A. Nothing happened particularly until the 22d of November.

Q. Where was the vessel on that day?

A. The vessel was about forty-nine degrees, thirty-seven minutes south latitude, and 66 degrees, 21 minutes west longitude. On that date the weather was fine until 9 o'clock at night. The wind increased in force rapidly, and we had to take in all sails but the *foresail*, *two lower topsails*, and the *lower staysails*. At 11 o'clock, the wind blew a storm, and the sea became heavier very rapidly. At twelve o'clock, in a gust, we lost the topmast stay-sail and the mizzen stay-sail. In a while the sea became tremendous, and we lost the fore stay-sail. The ship not being stayed by the sails we had lost she rolled terribly. The decks

were full of water. The decks being full of water, and the ship rolling heavily, we could not get the exact soundings.

Q. Could you pump?

A. No, sir; we could not pump. I went myself in the pump well, and I saw there was an increase of water, but we could not pump because the bottom of the pipe at each rolling was dry, the vessel being on her side. Another survey was made at four o'clock in the afternoon, and we saw the same thing, the sea being still very heavy, and the wind shifting to the southwest, the ship in a cross sea. We wore the ship around at 8 o'clock. The sea was very high until the 25th of November at 8 o'clock A. M. On the 24th of November, coming around westerly at 2 o'clock P. M., we wore the ship around to take a starboard tack. I ordered the pumps to be sounded by the carpenter when the ship was upright, and the carpenter reported that he found one meter and 25 centimeters in the hold, so that *the water had increased rapidly since the morning*. After the wearing of the ship, I set one watch to the pumps, and ordered an examination of the life-boats made to see that they were in order. At six o'clock, the wind freshened again, big seas coming from every part; the decks being always covered with water it was very difficult to work the pumps. *At six o'clock, we found one meter, and fifty-five centimeters in the hold.* At six o'clock I called the crew aft and explained to them the situation, and we resolved to take refuge in the Falkland Islands for the saving both the cargo and the ship. At the same hour we kept her off, and made for the Islands.

Q. We do not need the further details until you get to the place where you beached the ship.

A. That is a few hours later. Both watches were relieving each other at the pumps every half hour, so they were working continually, and *I saw that the water did not increase so much while the ship was running before the wind*. The ship was

steering very badly when we were close to Roy Cove. We entered the cove at 4:30 and at 4:35 the ship was beached at 500 meters from the entrance to the cove. *At that time the sounding of the pump was two meters and 27 centimeters, the ship having a list of 6 degrees to starboard.*" (Ap. 165-7.)

* * * * *

"Q. Now, the log records stormy weather on the page marked 'From midnight of the 22d to midnight of the 23d of November.' Up to that time, had there been any noticeable change in the amount of the water that the ship took in?

A. *I have always noticed that the water was rising one centimeter every hour.*

Q. What you mean is, that there was a uniform amount of water coming in to the ship each day up to the 22d of November, which amounted to about one centimeter per hour?

A. Yes, sir.

Q. When the storm of the 22d came on, did it come on suddenly at midnight of that day, or was it coming on for some time on the previous day?

A. It came progressively. It began with north wind, the gale fell, shifting to the north-west and getting fresh.

Q. *The storm really began to come on, then, on the last quarter of the 21st, namely, from 8 o'clock at night to midnight?*

A. Yes, sir.

Q. *And in the second quarter on the morning of the 22d, the discovery was made that the water had increased abnormally. What hour was that second watch?*

A. *From 4 to 8 o'clock in the morning of the 23d.*

Q. And after that time, it was impossible, you say, to have any control over the water with the pumps?

A. *We could not control the water, but we were making an examination of the pump-well.*

Q. But you were unable to pump the water out excepting a small part of it?

A. Yes, sir.

Q. You could not control it? A. No, sir.

Q. *Now, Captain, during that time, when the leak increased so largely, what sail was your ship carrying? Can you tell by looking at your log?*

A. *The foresail and two lower topsails. We had lost the jib and lower staysails.*

Q. How long before?

A. We lost the staysails at midnight, and the fore staysail between midnight and 4 o'clock.

Q. How many miles an hour were you making during that watch? A. About 4 knots.

Q. *In what direction was the wind then?*

A. *Southwest.*

Q. Was that a free wind or a head wind?

A. *It was a head wind.*

Q. Now, before this last storm took place, had the vessel been rolling very much?

A. Not much, excepting in a storm on the 5th of November.

Q. *In your opinion, Captain, was the hole that was discovered in the ship's hold, and which was caused by the loss of a rivet, sufficiently large to account for the immense amount of water that got into the ship immediately that she began to have bad weather?*

A. *I think there was something else.*

Q. *Is it not your opinion from all that you have been able to ascertain, that the laboring of the ship caused the butt ends of the plates to separate or to open, and let water in between the plates?*

A. *I think that the ship made a little water by the butt ends.*

Q. *That little water that you speak of made by the butt ends added to the water that would*

come in by the rivet hole, would those two together be sufficient to account for the immense amount of water that came in so rapidly when you struck the heavy weather? A. Yes, sir.

Q. Is it your opinion, Captain, that the water did actually come in in part by the rivet hole before arriving at Roy Cove? A. Yes, sir.

Q. And how large was that rivet hole in diameter or in circumference?

A. It was a rivet of 23 millimeters in diameter when the ship was new.

Q. Was it any larger after the ship became older? A. No, sir, it was the same.

Q. Now, when the ship was making, as you said a little while ago, in your opinion, about one centimeter an hour of water, was it your opinion that at that time the rivet was already out? A. The rivet was not out.

Q. Have you any opinion what it was that was causing the ship to leak up to the time that the rivet fell out?

A. My opinion is that the rivet started to get loose in the first storm of the 27th of September, and that the same rivet jumped out in the storm of the 23d of November." (Ap. 198-200.)

While the weather met on and after November 22d was much more severe than the moderate weather of September, it was the kind of weather to be reasonably expected in the lower latitudes in the vicinity of Cape Horn at that season of the year. The opinions of the ship masters were in unanimous accord upon that point. Captain Davidson said of the weather described by the master of the "Duc d'Aumale":

"Well that is the ordinary kind of weather that you might expect there * * * It is a very common experience there because the wind and weather both change very rapidly." (Ap. 242.)

Of the cross sea encountered, he testified:

“That is an ordinary experience off of the Horn.” (Ap. 242.)

Captain Manning did not think that it was weather different from what might be expected on a voyage around Cape Horn from the South Atlantic to the South Pacific in November (Ap. 263). And Captain Fleming said that the weather was quite usual (Ap. 280). Captain Curtis spoke of it as follows:

“Q. How many times, in your experience, do you suppose you have passed around Cape Horn?

A. Oh, I should say 20 times or more.

Q. What kind of weather do you ordinarily expect to encounter on a voyage from the South Atlantic to the South Pacific, around the Horn, in the months of November and December?

A. Well, we expect most of the weather to be pretty bad.

Q. What effect does the weather that you may expect have upon the ship? Describe it as well as you can, so that in that way to indicate to us the character of the weather.

A. Well, strong winds kick up heavy seas and in all heavy seas a ship will strain more or less.

Q. Will she have any water on her deck?

A. If she is a loaded ship she will most always have water on the deck, more or less.

Q. Have you ever found it necessary to shorten sail when you are in the vicinity of the Horn?

A. Yes, very frequently.

Q. Would you, if you were in the vicinity indicated on the chart marked Libellant's Exhibit 'C' to the northwestward of the Falkland Islands, which is approximately the location of the 'Duc d'Aumale' on the 22d of November—do you see that there? A. Yes.

Q. Now, bearing that location in mind, Captain, I will ask you whether or not the weather you there

encounter is in any very great particular different from that in the immediate vicinity of the Horn?

A. Well, the winds are very much the same, but the seas are very different.

Q. What difference is there, Captain?

A. As a rule, you are closer to the land and the wind is mostly off the land, the greater part of it, and you do not experience as heavy seas there as you would down in the unbroken ocean.

Q. State whether or not you might expect in that vicinity seas such as would throw water on to the deck of your vessel?

A. Oh, yes, a great deal of it.

Q. Is an experience of that sort confined to any particular waters or any particular localities of the oceans, taking the water on the deck of your vessel?

A. No. In all oceans, where you are far enough south or far enough north to get bad weather, you have the same experience, in a great measure.

Q. When you strike the ordinary bad weather you may expect in the vicinity indicated by the chart, what kind of sail would you carry?

A. It depends altogether upon the weather we experience there at the time.

Q. Well, if it is the usual bad weather, what sail would you carry?

A. Well, if it is blowing a moderate gale we would carry the whole top-sails and the whole fore-sails. With a heavy gale we would probably come down to the three lower top-sails.

Q. *If you should encounter a gale of wind in that vicinity which compelled you to shorten sail to your three lower top-sails, would that be an unexpected and an unusual occurrence?*

A. *No, it would be more unusual if you did not have some weather of that kind.*

Q. If you were encountering such weather as compelled you to shorten sail to your three lower top-sails, will you state whether or not, Captain, you would expect a loaded vessel to have water on her deck?

A. We should expect her to have water on her deck, yes.

Q. Will you state whether or not, Captain, it is usual or unusual to have your ship so roll at sea that she will roll her bulwarks under?

A. Well, that is a very heavy rolling when you roll your bulwarks under.

Q. Well, do you expect it?

A. We get it sometimes, yes.

Q. Is it necessary to roll your bulwarks under to take water on the deck?

A. No, sir, not at all.

Q. Captain, did you hear the testimony read this morning? A. Yes.

Q. For the purpose of saving time I will ask this question: have you in mind the condition of the weather which was detailed in the log for the gales we will call it, off the Falkland Islands?

A. I think I have, yes.

Q. *Bearing in mind what you heard read from the log, I will ask you whether or not in your judgment, Captain, that weather was the usual or the unusual, the ordinary or the extraordinary weather such as you might expect to encounter or would not expect to encounter in that vicinity at that season of the year?*

A. *I should think it would be about the usual thing. Sometimes you go down there with very little bad weather, but you almost always get some.*" (Ap. 290-3.)

Captain Gibson characterized it as the usual weather and, in sailor-like fashion, pointed out that the "*Duc d'Aumale*" was carrying her foresail all through it. This appears from the following:

"I ask you whether or not in your judgment that was weather which was usual and might be expected in that vicinity on a voyage of that kind at that season of the year or was unusual or extraordinary weather?"

A. *That is the usual weather. That ship was carrying a foresail all through. That ship never took that foresail in by his log-book. Her stay-sail blew away and I suppose some old sails. The foresail was set all that time. She never took it in.*

Mr. HENGSTLER. Q. You do not know that?

A. *I know this by the log-book. The log-book is supposed to give every sail taken in off of the ship.*

Mr. CAMPBELL. Q. What kind of sails do you usually carry on your vessel in preparation for rounding the Horn?

A. Our best sails, and use them all we can.

Q. When you are encountering bad weather such as you might expect on a voyage of that sort, what kind of sail do you carry?

A. According to the weather. *If it is blowing heavy we carry what sail the ship will stand. We use our judgment. If we can carry a foresail we know it is not blowing a heavy gale of wind,—if she is carrying a foresail. If you are running before the wind you might. If you are laying to with a foresail with a head reach, you cannot do it. A foresail is a big sail and takes all hands to handle it.*

Q. *If you have got an extraordinary heavy gale what do you trim down to?*

A. *To two lower top-sails; perhaps even to one lower top-sail.*

Q. *Would it be unexpected weather on a voyage of that kind if you are compelled to trim down to lower top-sails?*

A. No, sir. You always expect something of that kind coming round the Horn. You are always expecting bad weather, summer or winter.

Q. Would the sea which would be raised by the weather of the character described, in your judgment be unusual, extraordinary, unexpected weather or the usual expected weather?

A. You will get a sea most anywhere. You will get sea when calm weather has been on. As long as it has been blowing a few hours you will get a sea on.

Q. *That does not answer my question, whether the character of sea raised by this kind of weather, would be usual or unusual or unexpected?*

A. *No, sir, it is the usual sea.*

Q. What kind of weather do you customarily have in that vicinity?

A. Sometimes good weather and sometimes changes. Perhaps 4 hours blowing a gale of wind and at other times it would be moderate. You would be taking in sails a good part of the time working your way around the Horn.

Q. *If this vessel was carrying her foresail during all that time what in your judgment was the kind of weather she was having?*

A. *An ordinary good strong blow; an ordinary gale; it was not a heavy gale."* (Ap. 322-324.)

There is no evidence to detract from the characterizations of the weather made by the experienced masters. When they were unanimous in saying, in effect, that the "Duc d'Aumale" encountered, on November 22nd, and following days, the kind of weather reasonably to be expected in those regions at that season of the year, the District Court was justified, indeed it could not do otherwise, in finding that in no other way than that the "Duc d'Aumale" was unseaworthy at the commencement of her voyage, could the leak which occurred on the 28th of September, and her subsequent condition near the Falkland Islands, be satisfactorily accounted for. In the words of Judge Wolverton, *supra*, How else could her condition be accounted for?

It certainly could not be rightly said that the weather encountered on and after November 22nd was of such hurricane velocity and destructiveness as to render unseaworthy a vessel previously sufficient in hull to

encounter the weather reasonably to be anticipated. There is no suggestion of any damage other than the carrying away of a few sails, a most common occurrence at sea. Her decks were not strained or seams opened or oakum disturbed; no injury was done to her deck houses, hatches or gear. The simple fact is that very shortly after the heavy weather was encountered (which necessarily increased the pitching and rolling of the ship and thereby subjected her to greater strains than previously experienced) and before the heaviest of it came on, the existing leakage increased. During all of that time the ship was under lower topsails and carrying a foresail which, as Captain Gibson in effect pointed out, was not a sail to be carried in extraordinarily heavy weather (Ap. 322-4). It was a good strong blow to be sure, but of a character to be reasonably anticipated.

It afterward developed that a rivet of 23 millimeters in diameter had dropped from the ship's bottom, but that alone was not sufficient to account for the large increase in water on encountering the storm of November 22nd. *The master thought that there was something else, and that something, in his opinion, was the making of water by the butt ends of the plates* (Ap. 199-200). The reasonableness of this conclusion is shown by the fact that the "Duc d'Aumale" made less water on running before the wind (Ap. 167), and that some of her butt seams were found to be open on docking at Buenos Ayres.

It was a pure case of leakage developing under the stresses and strains of weather which the "Duc d'Au-

male'' was almost certain to meet on the voyage around the Horn. Whether the loosening of the rivets and the opening of the butt seams were due to their inherent condition on sailing, or resulted from the strain upon the hull produced by the stowage of her cargo, the fact remains that the influx of water was due to unseaworthiness, the disastrous results of which were consummated in the beaching at Roy Cove. She was not in fit condition to meet the most ordinary kind of weather immediately on leaving port and still less capable of encountering the severer weather of the lower latitude. She thus failed to meet the tests of unseaworthiness.

In *Dupont v. Vance*, 19 How, 162; 15 L. Ed. 584, Mr. Justice Curtis defined the test of unseaworthiness as follows:

“It is the hull of the vessel which was alleged to have been unseaworthy. To constitute seaworthiness of the hull of a vessel in respect to cargo, the hull must be so tight, staunch, and strong, as to be competent to resist all ordinary action of the sea, and to prosecute and complete the voyage without damage to the cargo under deck.”

And in *The Arctic Bird*, supra, Judge De Haven prescribed it to be:

“Unseaworthiness has been defined as ‘that quality of a ship which fits it for carrying safely the particular merchandise which it takes on board.’ (The Thames, 10 C. C. A. 232, 61 Fed. 1014); or, in the language of Baron Parke, to be seaworthy a vessel must be ‘in a fit state as to repairs, equipment and crew, and in all other re-

spects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it' (Dixon v. Sadler, 5 Mees. & W. 405)."

To the same effect was the holding of this court in *Steamship Wellesley Co. v. C. A. Hooper & Co.*, supra, wherein Circuit Judge Gilbert said:

"And the vessel is not seaworthy when from her improper loading she is rendered unfit to encounter the ordinary perils of navigation which could reasonably have been anticipated on the projected voyage. *The Colima* (D. C.) 82 Fed. 665; *The Whitlieburn* (D. C.) 89 Fed. 526; *The Oneida* (D. C.) 108 Fed. 886; *Id.*, 128 Fed. 687, 63 C. C. A. 239; *The G. B. Boren* (D. C.) 132 Fed. 887."

In *Benner Line v. Pendleton*, 217 Fed. 497, 501, the Circuit Court of Appeals for the First Circuit said:

"To constitute unseaworthiness the hull must be so tight, staunch and strong as to be competent to resist all ordinary action of the sea, and to prosecute and complete the voyage without damage to the cargo."

By every test the unseaworthiness of the "*Duc d'Aumale*" is established. She was not sufficiently tight, staunch and strong to withstand the winds and seas which were to be expected on the voyage from Rotterdam to San Francisco. To save her from the consequences of her unseaworthiness, the "*Duc d'Aumale*" was beached at Roy Cove, damaging her cargo.

**THE UNSEAWORTHINESS WAS DUE EITHER TO DEFECTS IN
THE HULL OR TO IMPROPER STOWAGE OF CARGO.**

**The Hull Was Defective at Least in Respect to the Rivets
and Butt Seams.**

On drydocking the "Duc d'Aumale" at Buenos Ayres, one rivet was discovered to be entirely gone one meter forward of the mizzen mast and about one foot off the keel on the starboard side. The master admitted that several other rivets were leaking, especially very close to the foremost (Ap. 179-180), but the report of the Buenos Ayres' surveyors stated that "*200 to 300 rivets leak slightly*" (Resp. Exhibit 5). The cement was broken at the butt ends of the plates (Ap. 180, 202), requiring re-cementing, the insertion of steel blades and caulking (Ap. 202). The captain testified to the leakage of the ship, being produced partly by defective butt ends (Ap. 210).

There is no evidence that that condition, at least in part, did not exist at the commencement of the voyage at Rotterdam or at Brest. Certain it is that the leakage which was discovered on September 29th was partially caused by these openings in the hull, for it will be recalled that the master testified that in his opinion the increase of leakage in the storm of November 22nd indicated that water was coming in, not only through the hole made by the loosened rivets, but through the butt end seams (Ap. 200).

**The Stowage of the Cargo Was Improper and Produced
Upon the Hull Sheering Strains Which Tended to Open
the Butt Seams.**

The "Duc d'Aumale" was loaded with 2015 tons of coke and 660 tons of pig-iron, 60 tons of the pig-iron

being stowed in the between decks immediately abaft the main hatch, and 600 tons in the lower hold immediately abaft the line of the main hatch, in a block 63 feet long and 36 feet wide at its forward-end and 23 feet wide at its after-end.

The stowage of that quantity of pig-iron in one body in the lower hold was condemned by the surveyors appointed by the French Consul and by Mr. Eck and Captain Schutz, who examined the vessel in her damaged condition on the drydock at Buenos Ayres, as having strained the ship too much on the first part of the voyage. A change in stowage was advised by the surveyors (Ap. 187, 203, Libellant's Exhibit A). On re-stowing, however, the large block in the lower hold was divided, 350 tons being placed in one pile on the forepart of the after-hatch, a small pile on the after part of the after-hatch and a smaller lump abaft of the foremast (Ap. 187).

That the stowage was improper in the distribution of its weights was also the opinion of Captains Curtis and Gibson, disinterested witnesses, who criticized it for the strains it produced upon the hull (Ap. 297-9, 302-7, 317, 331-7).

The testimony of Mr. David W. Dickie, a naval architect and engineer, makes it clear that the stowage of the 600 tons of pig-iron in one body immediately abaft the line of the main hatch, produced an excessive sheering strain on the bottom of the vessel in the region of the mizzen mast at the end of the pig-iron, and between the after end of the main hatch and the main mast, with a slight excessive strain in the region of

the foremast (Ap. 362, 371). This strain as explained by Mr. Dickie would tend to spring the butt ends and to cause them to open as they did. That they opened before the stranding, was established by the greater inflow of water as the strains upon the vessel increased, a condition admitted by the master (Ap. 200). This sheering strain, in the opinion of Mr. Dickie, was materially lessened by the redistribution of the cargo made at Buenos Ayres (Ap. 370).

None of the witnesses called by the appellants, unless it was Mr. Frear, testified with respect to the sheering strain produced by the stowage of the pig-iron in one body, but only concerned themselves with the questions of stability and trim, an entirely different matter and one solely affecting the sailing qualities of the ship, and not the condition which would tend to open the butts. As regards Mr. Frear's criticism of Mr. Dickie's opinion, it was evident from Mr. Dickie's reply thereto that such criticism fell short of casting doubt upon the correctness of Mr. Dickie's conclusions. His expert opinion measured up to the actualities of the voyage.

Testimony was given by those who surveyed the vessel at Rotterdam and by others called as witnesses, that the ship was sound in hull and properly stowed.

The evidence is thus divided, but with the ever-present fact of unseaworthiness on the side of those who condemned the stowage. It is certain that the "Duc d'Aumale's" rivets loosened and her seams opened in the course of the voyage in weather to be reasonably

anticipated. And such condition of hull could have been, and was, in the judgment of the surveyors who saw the vessel on drydock at Buenos Ayres and by Naval Architect Dickie, produced by the stowage which they criticized, and it was rectified at Buenos Ayres. It is significantly corroborative of the opinions of the experts that thereafter on the long voyage via the Cape of Good Hope from Buenos Ayres to San Francisco, when the cargo had been restowed and the weight distributed so as to lessen the sheering strain, the vessel met with no further difficulties.

**THE CAUSE OF THE LOSS BEING THE UNSEAWORTHINESS
OF THE "DUC d'AUMALE", HER OWNER IS LIABLE FOR ALL
DAMAGES TO CARGO RESULTING THEREFROM.**

The damages to the cargo for which the District Court entered a decree in favor of appellees were, as we have pointed out, caused by the unseaworthiness of the "Duc d'Aumale." Whatever, therefore, may have been the character of the examination made by the surveyors at Rotterdam, or the extent of the repairs then placed upon the vessel, it did not relieve the owner from the liability cast upon it by the unseaworthiness of the ship. That the absolute warranty of seaworthiness implied in every charter and contract of affreightment is not complied with merely by the owner's exercise of due diligence to make the ship in all respects seaworthy, and does not free the owner from liability for loss resulting from unseaworthiness, has been definitely settled by a long line of decisions of the Supreme Court, and notably in the case of

The Carib Prince, 170 U. S. 655, 42 L. Ed. 1081,
1086,

wherein Mr. Justice White, delivering the opinion of the court said:

“Now, it is patent that the foregoing provisions deal not with the general duty of the owner to furnish a seaworthy ship, but solely with his power to exempt himself from so doing by contract, when the particular conditions exacted by the statute obtain. *Because the owner may, when he has used due diligence to furnish a seaworthy ship contract against the obligation of seaworthiness, it does not at all follow that when he has made no contract to so exempt himself he nevertheless is relieved from furnishing a seaworthy ship, and is subjected only to the duty of using due diligence.* To make it unlawful to insert in a contract a provision exempting from seaworthiness where due diligence has not been used, cannot by any sound rule of construction be treated as implying that where due diligence has been used, and there is no contract exempting the owner, his obligation to furnish a seaworthy vessel has ceased to exist.” (Italics ours.)

The implied warranty of seaworthiness was recognized by this court in

Corsar v. J. D. Spreckels & Bros. Co., 141 Fed.
260,

and of it Circuit Judge Ross, delivering the majority opinion of the court, said:

“Now, the contract on the part of the ship required her to be in all respects seaworthy for the voyage she undertook. Indeed, unless otherwise expressly stipulated, an implied warranty of seaworthiness of the ship at the time of commencing the voyage accompanies every contract of

affreightment. *The Caledonia*, 157 U. S. 130, 131, 15 Sup. Ct. 537, 39 L. Ed. 644. And this includes, not only a ship seaworthy in hull and equipment, which conditions it is conceded the *Musselcrag* met, but also seaworthy in respect to the stowage of the cargo. *The Edwin I. Morrison*, 153 U. S. 211, 14 Sup. Ct. 823, 38 L. Ed. 688; *Carver on Carriage by Sea*, sec. 18; *Sumner v. Caswell* (D. C.), 20 Fed. 249; *The Colima* (D. C.), 82 Fed. 665; *The Whitlieburn* (D. C.), 89 Fed. 526; *The Oneida* (D. C.), 108 Fed. 886; *Id.*, 128 Fed. 687, 63 C. C. A. 239; *The William Power* (D. C.), 131 Fed. 136; *The G. B. Boren* (D. C.), 132 Fed. 887."

And in the late case of

Benner Line v. Pendleton, 217 Fed. 497, 500,

the Circuit Court of Appeals for the Second Circuit reaffirmed the absolute undertaking of seaworthiness, Circuit Judge Rogers saying:

"There can be no question but that it is the duty of the shipowner to provide a ship which is fit and competent for the cargo and particular service for which she is engaged. The carrier either expressly or impliedly warrants the seaworthiness of the vessel at the commencement of the voyage. *The Carib Prince*, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181. *And this warranty that the vessel is fit at the beginning of the voyage is an absolute undertaking, which is not dependent on the owner's knowledge or ignorance that the ship is in fit condition to undergo the perils of the sea.* *The Caledonia*, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644. The warranty covers latent defects, not ordinarily susceptible of detection, as well as those which are known or discoverable by inspection. In *The Edwin I. Morrison*, 153 U. S. 199, 210, 14 Sup. Ct. 823, 825, 38 L. Ed. 688 (1894), the Supreme Court adopted the language used by Mr. Justice Gray in the Circuit Court in which he said:

“ ‘In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy. * * * *The warranty is absolute that the ship is, or shall be, in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence.*’ ”

And in *The Caledonia*, 157 U. S. 124, 130, 15 Sup. Ct. 537, 540, 39 L. Ed. 644 (1895), the above doctrine is reaffirmed and Mr. Chief Justice Fuller said:

“ ‘The proposition that the warranty of seaworthiness exists by implication in all contracts for sea carriage, we do not understand to be denied; but it is insisted that the warranty is not absolute, and does not cover latent defects not ordinarily susceptible of detection. If this were so, the obligation resting on the shipowner would be, not that the ship should be fit, but that he had honestly done his best to make her so. We cannot concur in this view. *In our opinion the shipowner’s undertaking is not merely that he will do and has done his best to make the ship fit, but that the ship is really fit to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage; and, this being so, that undertaking is not discharged because the want of fitness is the result of latent defects.*’ ” (Italics ours.)

As neither the charter party nor the bills of lading contracted against the obligation of seaworthiness, the liability of the owner of the “Duc d’Aumale” is fixed, and the decree of the District Court grounded thereon should be affirmed.

APPELLANT'S CONTENTIONS AS TO SEAWORTHINESS OF THE
"DUC d'AUMALE" ARE UNSOUND.

Presumption of Seaworthiness.

Appellant's contention as to the seaworthiness of the "Duc d'Aumale" are grounded upon the assertion that there is in law the principle that in the absence of proof to the contrary, a vessel will be presumed to be seaworthy. Such a statement is cited from a parenthetical remark of Mr. Justice Brown in *The Chattahoochee*, 173 U. S. 540, 550, which, in a reference to the third section of the Harter Act, was the purest *obiter dicta*. This presumption is not in accord with the weight of authority, for it has long since become a settled rule of construction of the Harter Act that the owner must show affirmatively the exercise of due diligence to make his vessel seaworthy before he can invoke the limitations of the third section of the act. Seaworthiness is not presumed. It was so held in the later case of

The Wildcroft, 201 U. S. 378; 50 L. Ed. 794, 797, wherein Mr. Justice Day, delivering the opinion of the court, said:

"To permit a cargo of sugar to be injured by the introduction of fresh water in the manner shown, but for the provisions of this act (Harter Act), would have made a case of clear liability against the owner; and when the statute has given immunity against such loss by reason of error in navigation or management, it does so upon the distinct condition that the owner shall show that the vessel was in all respects seaworthy and properly manned, equipped, and supplied for the voyage; or, if this cannot be established, that he has used due diligence to obtain this end. *The discharge of this duty is not left to any presumption in the*

absence of proof. It is the condition precedent, compliance with which is required of the vessel owner in order to give him the benefit of the immunity afforded by the act."

By this authority there is then no presumption of seaworthiness which overcomes or offsets the presumption (inference) of unseaworthiness arising from the springing a leak of the "Duc d'Aumale" so shortly after the commencement of her voyage without her having encountered sufficient cause therefor. It is idle for appellant to suggest that the ship may have struck something, for even the master does not make that claim. A somewhat similar theory was exploded in *Benner Line v. Pendleton, supra*.

Seaworthiness of the Hull.

The fact that the surveyors who examined the "Duc d'Aumale" before loading did not admit her actual unseaworthiness does not prove her seaworthiness on sailing. They may have exercised due diligence to make her seaworthy, but that act would not *per se* render her seaworthy, or overcome the presumption or inference of unseaworthiness arising from the subsequent leakage. It was pertinently said by the District Court:

"But it is argued that this presumption or inference is overcome in this case by proof that the "Duc d'Aumale" was inspected before sailing by competent experts and pronounced seaworthy. I do not think such evidence is conclusive. *The inspection was general, largely visual, and not particularly of the parts which proved defective.* The testimony of the experts that they made an inspection and found the ship in good condition is, of

course, persuasive and often satisfactory evidence to show that the vessel was in fact seaworthy at the time she sailed, but it is by no means conclusive." (Italics ours.)

The circumstances under which the leak developed and afterwards increased, and the condition of hull in rivets and butt seams as disclosed on drydocking demonstrated that she could not have been seaworthy at the inception of her voyage.

Seaworthiness as to Stowage.

In aid of its reliance upon the opinions of the interested witnesses whose depositions were taken in Europe on the matter of stowage of the cargo, appellant quotes a statement of abstract law from *36 Cyc.*, page 251, which cites as its sole authority, *The Musselcrag*, 125 Fed. 786. Indeed, appellant quotes from the decision, and yet it is worthy of note that the Circuit Court of Appeals for the Ninth Circuit expressly overruled the District Court's finding, which was grounded upon the principle which appellant would now invoke. The Circuit Court of Appeals found that the stowage of the *Musselcrag's* cargo was not proper, despite the testimony of the interested witness in the foreign loading port. In so doing it accepted the opinions of the disinterested ship masters in the port of San Francisco, corroborated as they were by the circumstances occurring on board ship.

The fact, then, that those who loaded the "Duc d'Aumale", and were thus interested in the controversy, testified that her cargo was properly stowed should not outweigh the opinions of the disinterested sur-

veyors at Buenos Ayres, who formed this conclusion,—that the cargo weights were not properly distributed from their observations of the effects of the strains from the cargo upon the hull in weather ordinarily to be expected, supported as those opinions are by the defects developed in the hull, and by the opinions of equally disinterested opinions of shipmasters and naval architects in San Francisco.

Presumption of Continuing Seaworthiness Inapplicable.

The doctrine of presumption of continuing seaworthiness, as enunciated in *The Edwin I. Morrison*, 153 U. S. 199, and the other cases cited, has no application to the instant case because the latter lacks the condition precedent to the invocation of the principle, namely, the actual seaworthiness of the “Duc d’Aumale” at the commencement of her voyage was not established. The presumption in *The Edwin I. Morrison* was expressly predicated upon the establishment of absolute seaworthiness at the beginning of the voyage. Of course that cannot be invoked in the present case because the evidence shows to the contrary, that the “Duc d’Aumale” was unseaworthy on sailing.

APPELLANT CANNOT INVOKE THE IMMUNITY OF THE THIRD SECTION OF THE HARTER ACT.

Granting that due diligence was exercised to make the “Duc d’Aumale” seaworthy, still appellant cannot invoke the immunity against negligence in management or navigation of the vessel afforded by the third section

of the Harter Act, for the efficient cause of the damage to the cargo was not negligence in management or navigation of the "Duc d'Aumale," but her unseaworthiness.

In its effort to evade liability for its failure to comply with the warranty of seaworthiness implied in the charter party and bills of lading, appellant would thrust upon its 26-year-old master the responsibility for the damage to the cargo which was consummated by the beaching of the "Duc d'Aumale" in Roy Cove, because the youthful master did not return to port for repairs when he discovered his ship making water so as to require 40 minutes' pumping out of every 24 hours to free her. Its whole contention in this regard is that the failure of the master to turn back to port nearly two months prior to the consummation of the loss was the proximate cause of the loss. Despite its verbalistic efforts to thus fix responsibility upon the master, the fact remains that it was the increase in leakage in the unseaworthy hull of the "Duc d'Aumale" caused by the strains of the heavier seas encountered off the Falkland Islands, threatening her safety, which operated as the efficient cause of the beaching and the subsequent damage to the cargo. The proximate cause was the vessel's unseaworthiness,—not the act of the master.

The contention thus adroitly advanced by appellant is said to find support in *Corsar v. J. D. Spreckels & Bros. Co.*, 141 Fed. 260, and an excerpt from the opinion is quoted. But if the further portion of the court's opinion is read, it will be observed that it held that the "Musselcrag" was liable for all of the damages

because of her unseaworthiness at the inception of her voyage.

The lower court had found that part of the damage to cargo had resulted from the neglect of the master to put into Port Stanley for repairs at a time when the "Musselcrag" was but 60 miles distant, and part from perils of the seas. It refused to hold that neglect of the master was within the purview of the third section of the Harter Act, and for that reason held the owner liable for one half of the damages to cargo. On appeal, this court found that the vessel was not seaworthy and reversed the lower court, holding that the cargo owner was entitled to recover for all of the loss and damage sustained. As that included the damage resulting from the negligence of the master, the immunity of the Harter Act was denied the owner. This appears from the following:

"We are, therefore, of opinion that if it be true, as the court below held, that the Musselcrag was in all respects seaworthy for the voyage she undertook at the time of entering upon it, neither the ship nor her owner was responsible for any part of the damage sustained by the cargo by reason of the action of the master in shaping his course for the Cape of Good Hope instead of going to Port Stanley. *But, if the ship in question was not seaworthy for the voyage she undertook at the time of entering upon it, then, clearly, the libellant is entitled to recover for all of the loss and damage sustained.*" (Italics ours.)

The decision is thus an authority for an affirmance of the ruling of the District Court in the present case.

An analogous contention was made in

*Pacific Coast S. S. Co. v. Bancroft-Whitney Co.,
supra.*

wherein it was urged that the proximate cause of the damage to cargo was the stranding of the "Queen of the Pacific" to escape foundering from a leak which developed in fair weather, within twelve hours after leaving the port of San Francisco, and thus "a danger of the seas," and not the unseaworthiness of the vessel. This court exposed the fallacy of the contention in the following language:

"Appellant contends that the stranding of the Queen is the *causa proxima* of the damage, and was a sea peril, within the meaning of the special contracts relieving the Queen from all liability for damage resulting from 'dangers of the sea,' and that upon the established facts 'that a thoroughly seaworthy vessel, without negligence on the part of her crew, springs a leak 12 hours after she sails, she not having, so far as is shown, encountered anything unusual upon the voyage, what is the presumption relating to the leak? Was it the result of accident? Was it the result of a sea peril? That it must be presumed to have resulted from the one or the other, seems evident.' *We are of opinion that the stranding of the ship at Port Harford was only incidental in causing the damage. The steamer was run to the beach, not because of high winds or boisterous weather, or any danger of the sea, but from the fact that a leak had been discovered which could not be controlled. The fact, if it be the fact, that the merchandise was not wet with sea water until the steamer stranded at the beach, is wholly immaterial. It was the leak in the steamer that was the cause of the damage,* and the real and only question necessary to be discussed is whether that leak was occasioned by a peril of the sea, or came within any of the excep-

tions mentioned in the shipping receipt, or, if the cause of the leak is not shown, then, upon the presumptions which the law raises as to the burden of proof; and we shall confine our discussion to those points.” (Italics ours.)

To the same effect was the ruling of the Supreme Court in

The Portsmouth, 9 Wall. 682,

wherein it was said:

“If a jettison of a cargo, or a part of it (and, as matter of course, damage thereto), is rendered necessary by any fault or breach of contract of the master or owners of the vessel, the jettison must be attributed to that fault, or breach of contract, rather than to the sea peril, though that may also be present and enter into the case.”

By the weight of those authorities, escape from liability cannot be had by appellant through the claim of negligence on the part of the master in management and navigation in not returning to port after the leakage of September 29th.

But even if the contention were sound that the loss was caused by negligence in management and navigation, still the protection of the Harter Act could not be invoked because appellant has not affirmatively shown that due diligence was exercised “to make the said vessel * * * properly manned, equipped and supplied.” There is no evidence as to the manning, equipping or supplying of the “Duc d’Aumale” and yet affirmative proof thereof is a condition precedent to the right of immunity under the Act. This was clearly pointed out in *The Wildcroft*, *supra*, whereof the court said:

“To permit a cargo of sugar to be injured by the introduction of fresh water in the manner shown, but for the provisions of this act, would have made a case of clear liability against the owner; and where the statute has given immunity against such loss by reason of error in navigation or management, it does so upon the distinct condition that the owner shall show that the vessel was in all respects seaworthy and properly manned, equipped, and supplied for the voyage, or if this cannot be established, that he has used due diligence to obtain this end. The discharge of this duty is not left to any presumption in the absence of proof. *It is the condition precedent, compliance with which is required of the vessel owner in order to give him the benefit of the immunity afforded by the act.* The reason for requiring this proof by the owner is apparent. He is bound to furnish a seaworthy and properly equipped ship for the purpose of the voyage.” (Italics ours.)

International Navigation Company v. Farr & Bailey Manufacturing Company, 181 U. S. 220; 45 L. Ed. 830.

We respectfully submit that the decrees of the District Court should be affirmed.

Dated, San Francisco,

October 20, 1917.

Respectfully submitted,

EDWARD J. MCCUTCHEN,

IRA A. CAMPBELL,

MCCUTCHEN, OLNEY & WILLARD,

Proctors for Appellees.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
 FOR THE NINTH JUDICIAL DISTRICT

HENRY SORENSON,	}
<i>Appellant,</i>	
vs.	
ALASKA STEAMSHIP COM- PANY, a corporation,	
<i>Appellee.</i>	

No. ~~3102~~

APPEAL FROM THE UNITED STATES DIS-
 TRICT COURT, DISTRICT OF WASH-
 INGTON, WESTERN DISTRICT,
 NORTHERN DIVISION.

BRIEF OF APPELLANT

JAMES B. METCALFE,
 J. VERNON METCALFE,
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417 Pacific Block
 Seattle, Wash.

Filed

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F. D. Monckton,
 Clerk.

IN THE
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HENRY SORENSON,
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No. 3102

APPEAL FROM THE UNITED STATES DIS-
TRICT COURT, DISTRICT OF WASH-
INGTON, WESTERN DISTRICT,
NORTHERN DIVISION.

BRIEF OF APPELLANT

STATEMENT.

This cause is a libel *in personam* against the respondent and appellee, the Alaska Steamship Company, a corporation incorporated under the laws of the State of Nevada, and doing business in the State of Washington.

The libel alleges that contractual relations existed between libellant and respondent before and on the 21st day of February, 1916; that libellant was an able seaman employed on board the S. S. Victoria, one of the respondent's vessels, which was being operated by respondent between the Port of Seattle and ports in the District of Alaska; the vessel had been lying at Boat Harbor, British Columbia, for several days prior to the 21st day of February, 1916, taking in a cargo of coal, which was being loaded on the ship by a gang of workmen employed by the owner of the coal at Boat Harbor, and assisted by the crew of the vessel, among whom was the libellant; the coal was poured from chutes into the hold of the vessel through the hatches of Compartment No. 2, and was only partially trimmed in the hold of the vessel, and in so doing there was left a considerable space below the 'tween decks in Compartment No. 2, which space extended around the hatchway in the lower hold of said Compartment No. 2, sufficient for the boatswain of the ship to walk around under the 'tween decks after the explosion in which libellant was injured; the cargo of coal after being loaded and partially trimmed at Boat Harbor, remained in the same condition for two days, and was in such condition at the

Port of Seattle on the morning of February 21st, 1916; the coal pile so taken in Compartment No. 2 reached from the hold of the vessel to and above the steerage deck (the second deck of the ship), filled all the space of the hatchways, and flowed out and around the hatch upon the 'tween decks, and completely shut out all ventilation of the said space so left in the lower hold of Compartment No. 2, this space was left unfilled at Boat Harbor, and unventilated until Monday morning, February 21st, 1916.

Orders on that date were given by the Master to the First Officer, and by him to the Boatswain to trim coal in Compartment No. 2, as they would take in freight at Bellingham.

The boatswain, McDonough, at about 7 o'clock A. M. on said February 21st, 1916, ordered libellant, Henry Sorenson and several other seamen to go into Compartment No. 2 'tween decks and "trim coal and leave space forward of the hatch 'tween decks for cargo to be taken at Bellingham; trim it anywhere, to do away with it the best way we possibly could."

These men were furnished with coal oil lanterns which were ordinary unguarded lights, common tubular lanterns, already lighted, and shovels to trim coal as above stated, at 7 o'clock A. M.

February 21st, 1916.

The libellant and three others went below to 'tween decks and for three hours trimmed coal to the wings of the ship and aft as high as the steerage deck in Compartment No. 2, until the coal from the pile began to run back on the shovellers; in other words the wings and aft of Compartment No. 2 were filled with coal, so that it would run back when shovelled upon the pile against the wings and aft.

Libellant Sorenson had been in the crew which had partially trimmed the coal in the lower hold of Compartment No. 2 at Boat Harbor; he knew that ample space existed in the lower hold below the 'tween decks in Compartment No. 2; a cone shaped pile of coal was still left in the 'tween decks hatchway after so trimming in the wings and aft, and ample space still existed in the lower hold beneath 'tween decks for such coal, and to place it there was the natural, proper and most expeditious way to dispose of this cone shaped pile still left in the 'tween decks hatchway.

The libellant thereupon under the orders so given by the boatswain to trim the coal the best way they could, to trim it anywhere, shovelled a hole in the corner of the 'tween decks hatchway

sufficient for him to slide through to the lower hold; this done he called out to the men above, "plenty of space down here," and asked for a lantern, which being handed to him, into the hold, burned first with a blue flame, and was immediately followed by a violent explosion of gas in this unventilated space where libellant was, burning and scarring his face, hands and body, and permanently injuring the left hand so far as to render his vocation as a seaman at an end; and the use of the left hand for any manual labor.

Libellant's sufferings were intense; his flesh was burned from his hands, requiring the use of morphine to deaden the pain of the dressings three times a day during two weeks, and was discharged from the hospital after seven weeks.

The ship was equipped with electric cluster lights with extension cords of sufficient length to reach to and were intended to furnish light to the lower hold.

Neither libellant nor the crew with him knew of the gas in the lower hold, nor had the slightest suspicion of its presence in the space into which libellant was attempting to trim the coal; nor anywhere else; this space in the lower hold was the natural and proper place to trim this coal pile in

the 'tween decks hatchway, which filled this entire hatch about 16 to 17 feet square, and reached about 6 or 7 feet above the coaming of the hatch; that this space was the natural and proper place to trim this cone shaped pile, for, *after the accident*, said coal *was trimmed* under the orders of the officers of the ship, into said *spaces* in the lower hold, and electric cluster lights were used in the trimming, instead of the open, unguarded lighted lanterns which were used by the crew at the time of the explosion.

SPECIFICATIONS OF ERRORS.

The final decree of the District Court includes no findings of fact save as to the hearing and trial of the case, and that "*heretofore on the 20th day of February, 1917, having filed its Memorandum of Decision,*" and dismissing libellant's cause.

The Assignment of Errors therefore runs to the findings in the Memorandum of Decision, as made a part of the Final Decree, although the errors assigned under the 9th, 10th, 11th and 12th assignments directed to the Final Decree support all the assignments and contentions of libellant in this appeal.

Digest of the evidence under each error assigned is cited to facilitate the convenience of the court.

I.

Under the first error assigned, that the hatch was filled and sealed by *professional sealers*, is scarcely comprehensible.

There were no professional sealers, and the hatch was not sealed. A gang of workmen, miners and stevedores at Boat Harbor and part of the ship's crew partially trimmed the coal in Compartment No. 2, and then put on hatch covers on the steerage deck over the extreme top of the pile. This constitutes all the sealing that was done.

What the Honorable Court had in its mind as to *professional sealers*, and *sealing the hatch*, cannot be understood: sealing of cargo on ships is only done by some officer of the law armed with *process or writ*. The coal being sealed (whatever that means) at Boat Harbor seems, from the Court's findings, to have a governing influence upon the decision it rendered, but in what manner it affected the trimming of the coal and the explosion at Seattle is not in any way disclosed by the reasoning of the Court, except that at the time the hatch was *sealed* a circular "V" shaped opening was formed around the hatch (between decks hatch in Compartment No. 2 in the hold) about five feet wide at the top and four deep."

This finding, as to the size of the space left, is utterly contrary to the positive evidence of the only witnesses who knew the facts.

TESTIMONY OF LIBELLANT, HENRY SORENSON, as to the space in the hold below 'tween decks hatch in Compartment No. 2. (Page and line refer to Transcript of Testimony.)

"Lots of space there on the fore part" (of the hatch; points out space on libellant's Exhibit "B"). (Page 9, lines 28-30.)

"Had worked trimming coal (with the hands in the lower hold of Compartment No. 2) before the boat left Boat Harbor." (Page 12, lines 1-3.)

"Was in the last gang to work in No. 2 hold * * * *when we went out lots of space there* * * * vessel in a hurry to get back to Seattle * * * got order to go back and go to Bellingham and take freight for Alaska." (Page 12, lines 5-10.)

"Plat marked 2 Exhibit 'B' reasonably represents the condition of the *spaces* and the coal and *how far it had been trimmed* at the time of explosion." (Page 12, lines 15-26.)

TESTIMONY OF EDWARD McDONOUGH, boatswain of the ship at the time of the explosion:

"*After the explosion*, not on 'tween decks, but down in the hold; *I worked underneath 'tween decks*

between the coal and the ship's sides." (Page 78, lines 18-28.)

"Hold (No. 2 hatch) was filled to a certain extent, but *when we went down there after the explosion happened, I went down there and walked around. I am not sure of any space on 'tween decks, but down there in the lower hold where I walked there was.*" (Page 79, lines 1-10.)

"Found plenty of space in the lower hold * * * there was *plenty of space there.*" (Page 80, lines 20-23.)

DEPOSITION OF SAMUEL DONOVAN:

"When everything cooled off (after the explosion) we went down in the lower hold (Compartment 2) trimming it again when everything was cool * * * and trimmed it over from the hatch then enough to get the hatches on to take in freight." (Page 117, lines 6-11.)

"Quite a space in the lower hold * * * 8 or 10 feet * * * when got down in lower hold (hatch No. 2) and got this clear away, we could stand up and shovel * * * straight forward, and I guess *I am nearly six feet* and I had lots of room myself." (Page 117, lines 18-22.)

DEPOSITION OF PETER IVERSON:

“When he (Sorenson) got down (in lower hold) he said *all kinds of space down here.*” (Page 149, lines 2-15.)

“Top of the coal (’tween decks hatch, compartment No. 2) was 6 or 7 feet. * * * There was all kinds of room down there * * * there was place for tons of coal down there * * * length of the hatch was 16 or 17 feet.” (Page 149, lines 12-26.)

The only evidence in any degree contrary is the testimony of the mate, Johnson. He testifies: “Don’t know how the explosion occurred.” (Page 117, lines 7-9.)

After the explosion Johnson went down in Compartment No. 2 and was overcome by the gas, rendered unconscious for half an hour and was sick the balance of the afternoon. That his evidence in the face of the four above witnesses is proven to be false, but what is infinitely worse, as first officer of the ship, he changed the entry in the log to show that no such *orders* were given the crew as testified by these witnesses and the boatswain of the ship. This change is made with a different pen and different ink. He testifies to this change: “Made entry in log of occurrence (explosion) * * * *the same day it happened* (on the 21st of February;

Proctor Bogle reads entry in log); entry was made right away * * * after *a few minutes* I went right up and made entry in the log book * * * right away, as required by law.” (Page 115, lines 19-30.)

“I changed the entry later on * * * that evening * * * I read it over and I said ‘*there is no use putting it down that way*’ * * * took my fountain pen and wrote that word ‘ordered.’” (Log Book Exhibit; page 116, lines 2-7.)

The above testimony is palpably false. First, he made the change after *a few minutes*; second, *later in the evening*. The whole was false, for he was unconscious for an half hour after the explosion, and remained sick the balance of the afternoon. McDonough, boatswain, testifies: “I did know that Johnson was in the room for the balance of the afternoon, and from the effects of the gas.” (Page 56; lines 1-16.)

Another important fact showing how shameless and untrue his statement of the change in the log is that this libel was not commenced nor filed until the 22nd day of September, 1916, seven months after the explosion, the first knowledge he had that the orders of the boatswain would become an important or controlling feature in this suit.

Upon the above testimony the District Court finds that there existed "a small V-shaped opening."

II.

The contention of libellant as to the second error assigned is the same as set forth in the first above Specifications of Errors, and the citation of testimony and authorities thereunder set forth are hereby referred to in maintaining the second error assigned.

III.

There is no evidence to support error numbered three, that an "open space still remained from the sides of the ship to the place where the coal was thrown of some six or seven feet for the full space 'tween decks."

The Honorable District Court in this statement shows the utter absence of consideration of the evidence of Witnesses Sorenson, McDonough, Donovan and Iverson as set forth under Specifications of Errors No. 1, to which we earnestly refer as completely upholding appellant's contention that no "open space still remained from the sides of the ship to the place where the coal was thrown of some six or seven feet for the *full space 'tween decks.*"

This finding of the Honorable District Court seems impossible in view of the evidence, for the

record shows the vessel to be forty feet beam with 16x16 hatches, so the space left was about 12 feet either side of the hatch to the wings on 'tween decks, and the space in the wings and aft were filled until the coal ran back on the shovellers.

IV.

Under the fourth error assigned the Honorable District Court again shows a lack of appreciation of the evidence given in the cause, in stating, that "Libellant, instead of shovelling the coal to the sides of the vessel and filling the wings and aft, dug a hole to the V-shaped opening in the hold of the vessel." Libellant did dig a hole in the corner of 'tween decks hatch, after shovelling to the wings and aft bulkhead until the coal ran back on the shovellers, and then a cone-shaped pile was still left in 'tween decks hatch that must be trimmed to put the hatch covers on to take in freight.

The only evidence that would go to establish this finding of the Honorable District Court we most respectfully contend is that of the mate, Johnson, while in positive and direct terms the members of the crew shovelling the coal is wholly to the contrary.

TRANSCRIPT OF TESTIMONY.

LIBELLANT SORENSON TESTIFIES:

“Plat 2, Exhibit ‘B’ reasonably represents the condition of the spaces and the coal, and how far it had been trimmed at the time of the explosion.” (Page 12, lines 15-26.)

“Received orders from the boatswain * * * to go down in No. 2 and trim the coal away, and leave as much space as possible in the forepart of ’tween decks, because we are going to Bellingham to take in freight, and to trim it in the wings and after part (’tween decks hatch) to do away with it the best way you possibly can.” (Page 8, lines 23-29.)

“Exhibit ‘A’ fairly represents the coal when we took the lines aboard and left the dock at Boat Harbor.” (Page 7, lines 13-24.)

“We were trimming coal in the wings and after part (of ’tween decks hatch) * * * was full and the wings got full and we could *not throw any more coal in the wings* and there was still a pile of coal left in the hatch (about 16 feet square), so I came out in the hatch in the hatch coaming and cut a hole in the corner, in the forward corner in the starboard side of the hatch coaming in the ’tween decks.” (Page 9, lines 4 -10.)

(Marks Exhibit “B” in red pencil.)

“We were trimming coal up towards the wings, and the after part and we filled that up.” (Page 9, lines 13-15.)

“The best way to get away with the coal was to go down underneath the 'tween decks.” (Page 9, lines 25-27.)

“The coal spread out on 'tween decks * * * it took us from seven o'clock in the morning until ten o'clock to get to the hatch coaming * * * about eight feet from 'tween decks to steerage deck and the hatch is about 16x16 feet.” (Page 25, lines 14-28.)

“ 'Tween decks hatch is about one-third of the width of the ship.” (Page 27, lines 1-2.)

“The wings of the ship were full and the coal coming back on us * * * the *after part was full* * * * if it had not been we could have thrown that pile on the after part.” (Page 31, lines 22-26.)

“Shovelled the coal up on the sides of the ship and against the bulkhead (aft) until the coal rolled back.” (Page 39, lines 11-15.)

“The hump (in hatch No. 2, 'tween decks) was still left after throwing the coal up against the sides of the ship and the bulkhead aft until it ran back and we could shovel no more.” (Page 39, lines 18-28.)

“The only place to put this hump (in ’tween decks hatch) was in there” (meaning the space in the lower hold below the ’tween decks hatch). (Page 39, lines 31-32.)

DEPOSITION OF SAMUEL DONOVAN:

(Trimmed coal) “right up to the wings * * * could not get any higher * * * it started to run down on us.” (Page 108, lines 8-11.)

“Could not throw any more.” (Page 112, line 29.)

“In both sides of compartment.” (Page 114, lines 2-3.)

“We could not get more coal in the wings and we started to go into the lower hold.” (Page 114, lines 9-11.)

CROSS-EXAMINATION:

“Told him (boatswain) we could not get in any more (in the wings) and the best thing to do was to try and get into the hold.” (Page 134, lines 26-29.)

“He says do the best you can to get the hatch clear.” (Page 135, lines 8-10.)

“We told the boatswain about it.” (Page 136.)

“It was piled right up to the coaming of the hatch.” (Page 136, lines 14-21.)

“Told the boatswain about it (trimming in lower hold) before we done it.” (Page 139, line 30.)

“He said, Do the best you can * * * that is what he told us to do, the best we could. He did not care where we put it so long as we got the hatches on.” (Page 141, lines 5-13.)

DEPOSITION OF PETER IVERSON:

“When we come to Seattle, started to trim coal to make space for freight * * * trimmed as far as we could in the wings, until we got down as low as ’tween decks.” (Page 149, lines 2-15.)

“Top of the coal was 6 or 7 feet (coal in hatch No. 2, ’tween decks) there was all kinds of room down there (hold below ’tween decks) * * * there was space for tons of coal down there * * * length of hatch about 16 or 17 feet.” (Page 149, lines 12-26.)

“Could not get any more coal in the wings because the wings were full.” (Page 154, lines 1-10.)

CROSS-EXAMINATION:

“Orders we got from the boatswain to go there and trim the coal to make space for cargo, and go down and *trim it the best way you know how.*” (Page 189, lines 12-16.)

We most respectfully urge that the evidence against the findings of the District Court, specified

in the fourth error assigned, is conclusively against the finding.

V.

Again, under the fifth error assigned, the Honorable District Court manifests the same disregard of the evidence on this point in stating that, "no specific order was given to take the lanterns," as a reason for the men using lanterns, as the evidence of the libellant and the crew ordered to trim coal is nearly wholly to the contrary.

TESTIMONY OF LIBELLANT SORENSON:

"That morning, February 21st, 1916, at seven o'clock A. M., the lanterns were standing outside the door, where we were living; the place is called the intermediate, and lanterns and shovels were standing outside."

"The lanterns were lit already; not the place the lanterns were kept; lanterns are kept in the lamp locker about 35 feet from there. I and several others were told to go to No. 2 hold and trim coal." (Page 13, lines 20-30.)

"The lanterns were furnished by the ship." (Page 14, lines 11-13.)

"Lanterns were just tubular lanterns * * * kept in (ships) lamp locker * * * watchman has charge of the lamps." (Page 34, lines 1-14.)

“Lanterns ordinary lantern * * * * used on board ship for any kind of work * * * open at chimney top, and air holes underneath for circulation of air * * * ordinary tubular lanterns.” (Page 38, lines 19-30.)

TESTIMONY OF EDWARD McDONOUGH, Boatswain.

“Sent Sorenson and most all the sailors to trim coal in compartment No. 2 * * * and each man had a lantern; they were already that morning * * * each man had a shovel and a lantern.” (Page 54, lines 2-27.)

TESTIMONY OF MATE JOHNSON:

“Keep the lamps in the lamp locker * * * the watchman has charge of them and also the oil lamps and lanterns and the filling of them.” (Page 118, lines 6-9.)

DEPOSITION OF SAM DONOVAN:

“Boatswain told us to get shovels and get the lamps.” (Page 131, lines 22-28.)

DEPOSITION OF PETER IVERSON:

“Lamps (lanterns) were ready for us in the morning * * * that was ordered by the boatswain.” (Page 154.)

“The boatswain ordered us to go into the lower hold and trim coal with the open lanterns.” (Page 187, lines 28-30.)

The lanterns lighted and shovels being placed ready for the crew, just outside their quarters, with orders to go below and trim coal scarcely needed a specific order "*to take the lanterns,*" but Witnesses Donovan and Iverson both testify that the boatswain gave that order.

VI.

The error of the Honorable District Court in finding "it is not necessary to discuss the ventilation of the hold of the ship" is so inconsiderate of the facts showing that there was a dangerous explosion of coal gas in Compartment No. 2, a seaman severely burned and maimed for life, all of which was the fault of the officers and servants of the vessel, and showed conclusively that the S. S. Victoria at the time was unseaworthy.

The coal was poured through the chutes into the hatches of Compartment No. 2 through three decks into the hold; it filled the lower hold until the hatch of Compartment No. 2, 'tween decks, was full and then spread over the floor of the between deck, all around the hatch. This, as already shown by the mass of evidence cited, still left a considerable space around the hatchway of the 'tween decks hatch in the lower hold,

The mass of coal continued to be poured in until

all ventilation in the lower hold was shut off in Compartment No. 2.

The coal gas accumulated there; the explosion took place there; Sorenson was terribly injured there; and the first officer, Johnson, and Boatswain McDonough were suffocated, rendered unconscious for a half an hour and ill for half a day from the effects of the gas confined in No. 2 hold subsequent to the explosion.

There was some testimony on the part of the respondent to the effect that explosions from coal gas confined for two days were unusual; but be that as it may, it is admitted that the explosion did take place and appellant was terribly injured, and that it was from coal gas in No. 2 Compartment.

There were no ventilators in Compartment No. 2 which reached more than a short distance below the steerage deck; the hold was ventilated by the open hatchway, and this had been closed from the time the boat left Boat Harbor for about fifty hours before the explosion:

TESTIMONY OF HENRY SORENSON, Libellant,

“Ventilators go through two decks * * * they finish underneath the steerage deck * * * to give steerage passengers air when steerage passengers sleep ’tween decks * * * ventilators go below steer-

age deck about three inches.” (Page 19, lines 21-30.)

“No ventilators in the lower hold, not lower than ’tween decks.” (Page 20, lines 21-30.)

TESTIMONY OF BOATSWAIN McDONOUGH:

“Ventilators go only as far as ’tween decks.” (Page 56, lines 26-30.)

“Through the steerage deck * * * do not go below the steerage deck.” (Page 56, lines 21-30.)

TESTIMONY OF ROBERT JENSEN, former boatswain of S. S. Victoria:

“Ventilators in No. 2 hatch * * * they go as far as the steerage deck * * * that is as far as they go.” (Page 75, lines 27-30.)

“Go as far as steerage deck to give ventilation for steerage passengers.” (Page 76, lines 1-4.)

DEPOSITION OF CAPT. O'BRIEN.

Captain O'Brien, master of the S. S. Victoria, testifies that while the steamer “Queen of the Pacific” lay at Nanaimo had coal gas explosion on board, which killed four or five persons while taking coal at said place. “There was an explosion on board the ‘Queen of the Pacific’ (now ‘Queen’) in which four or five persons were killed from an explosion of coal gas * * * was lying in Nanaimo or Departure Bay * * * about 35 or 40 miles from Boat Harbor.” (Page 358, lines 22-30.)

“There was a *coal explosion, of course*” (on S. S. Victoria). (Page 370, line 1.)

And yet the Honorable District Court finds that “it is not necessary to discuss the ventilation of the hold of the ship.”

VII.

The Honorable District Court again, under the seventh error assigned, states, “the contention of libellant would have more force if the libellant was at a place where he was directed to be,” shows the distraction of the mind of the District Court from the ample evidence of the orders given by the officers of the ship “to trim the coal between decks so as to take in freight; trim it anywhere, do the best you can,” and that the boatswain of the S. S. Victoria testified that the place where the libellant was, *was the natural and proper place* to trim the cone-shaped pile left standing in the between decks hatchway.

The libellant and several of the crew with him had partially trimmed the coal in the lower hold, Compartment No. 2, at Boat Harbor, and after trimming the coal in this compartment in the wings and aft until the coal from the pile ran back on the shovellers, libellant dug the hole in the hatch to enable the shovellers to go below between decks to

trim this pile so as to put the hatch covers on for freight space, as ordered.

Whether this finding of the Honorable District Court is sustained or utterly groundless depends upon the orders as to the trimming of the coal in Compartment No. 2, as given by the boatswain of the ship, the scope of these orders and their reasonable and natural construction as followed by the crew shovelling the coal.

LIBELLANT SORENSON TESTIFIES.

“Received orders from the boatswain * * * to go into No. 2 and trim the coal away, and ‘leave as much space as possible in the fore *part of ’tween decks*, because we are going to Bellingham to take in freight, and to trim it up in the wings and the after part (of ’tween decks) * * * to do away with it the best way you possibly can’.” (Page 8, lines 23-29.)

“Me and several others were told to go into No. 2 hold and trim coal * * * the orders were to trim the coal in the wings and after part, to leave the fore part clear. We were told to do away with it *the best way we possibly could* * * * by the boatswain of the ship.” (Page 14, lines 1-10.)

CROSS-EXAMINATION:

“Was told to do away with the coal the best

way I possibly could and that (below 'tween decks) *was the best way* * * * to go down to get plenty of room 'tween decks for freight, and get all the coal in the lower hold to make room." (Page 34, lines 27-30.)

"It was the best way to get lots of room for freight 'tween decks." (Page 35, lines 15-18.)

"The only place to put this hump was in there (lower hold below 'tween decks)." (Page 40, lines 1-3.)

DEPOSITION OF SAMUEL DONOVAN:

"Boatswain told us to go down and trim the coal as best we could." (Page 133, line 21.)

"We told him we could not get any more (in the wings) and the best thing to do is to try and get into the hold." (Page 134, lines 26-29.)

"He says, '*Do the best you can*; we have got to get the hatch clear.'" (Page 134, lines 8-10.)

"We told the boatswain about it (trimming in the lower hold) *before we done it*." (Page 138, line 30.)

"He said, '*Do the best you can*' * * * that is what he told us to do, the best we could. He did not care where we put it so long as we got the hatches on." (Page 141, lines 5-13.)

DEPOSITION OF PETER IVERSON.

CROSS-EXAMINATION :

“We had orders to get it away * * * the easiest way we could * * * that was the easiest way * * * because all kinds of space there (lower hold) * * * orders were to trim coal into the wings and the *best way we could.*” (Page 176, lines 3-11.)

“The boatswain ordered us to go into the lower hold and trim coal with the open lanterns.” (Page 187, lines 28-30.)

“Orders we got from the boatswain to go there and trim coal to make space for cargo, and go down and trim it the *best way you know how.*” (Page 189, lines 12-16.)

The testimony of Edward McDonough, then boatswain of the S. S. Victoria, seems to conclusively show that these men were acting in compliance with orders, but where appellant was injured was the natural, reasonable and proper place and the most expeditious for the purposes of the ship.

“Sent Sorenson and most all the sailors to trim coal in Compartment No. 2 * * * and each man had lanterns * * * they were already lit that morning * * * each man had a shovel and a lantern * * * orders from the chief officer was that they should shovel the coal away from the hatch in the wings

in place, so that we could get cargo in that hold * * * *any place they could shovel it* to get freight in the hold.” (Page 54, lines 2-27.)

“A number of men have sworn here that your orders were to go down and trim the coal in between decks so as to get space to take the cargo in, and *do the best you could* * * * * Do you remember whether or not that is true?”

“I might have said that if the boys said so.” (Page 54, lines 28-30; page 55, lines 1-2.)

CROSS-EXAMINATION:

“The order that I passed to the men was, I said to the boys, I said, Go down in No. 2, I said, and shovel that coal away from the hatch anywhere in the wings so that we can receive freight down there.” (Page 61, lines 1-5.)

“Did not give them any orders to go down to No. 2 hold; it was No. 2 hatch I gave them orders to go down * * * knew on the morning of the accident that these men had taken an open lantern in the lower hold.” (Page 65, lines 7-10.)

(To Bogle) “Know you read it out (affidavit) and I signed it. You made a statement and I read it out. Yes, but you were doing all the talking, though.” (Page 67, lines 8-16.)

Q. "Do you think the recollections of the fact was better at that time than it is now, two months after the accident?

A. "*Well, no; to tell you the truth I think I remember more about it now than then.*" (Page 68, lines 10-18.)

RE-DIRECT EXAMINATION:

"I told the men to trim the coal 'in the wings, or anywhere;' I guess something like that; I might have." (Page 69, lines 26-27.)

EDWARD McDONOUGH, recalled by Proctor Bogle.

"After the explosion not on 'tween decks, but down in the hold, *I worked underneath 'tween decks between the coal and the ship's side.*" (This District Judge's V-shaped hole. Page 78, lines 18-28.)

"Hold (No. 2 hatch) was filled to a certain extent, but when we *went down there after the explosion happened, I went down there and walked around.* I am not sure of any space on 'tween decks between the coal and ship's sides, but *down in the lower hold where I walked around there was.*" (Page 79, lines 1-10.)

"Found plenty of space in lower hold." (Page 80, line 20.)

"There was plenty of space there (lower hold) and naturally enough; I went around down in the

lower hold * * * was the *natural place* to put this hump of coal here in that space * * * if a man wanted to make easy work of it, naturally enough he would put it down there below."

Q. "Was that the proper place to put it?"

A. "This is the proper place, if a man is shovelling coal."

THE COURT: "Where was the proper place?"

A. "To put it down below in the sides of the ship." (Page 80, lines 21-28.)

THE COURT: "Was that the proper place to put it?"

A. "The *proper place to put it was down below.*" (Page 81, lines 1-2.)

PROCTOR BOGLE:

Q. "Why do you say then that it was the proper place to put it below?"

A. "Well, the idea is this: if there is space, down in the hold, naturally you are going to fill the lower hold." (Page 81, lines 1-20.)

Does it not appear from this testimony that the appellant was wholly within the direction and scope of the orders of the officers of the ship as to "the place where he was directed to be?"

Reference is here particularly made to the *significant change in the log of the ship by Mate*

Johnson.

VIII.

The Honorable District Court in its findings set forth in the eighth error, that “the acts with relation to *the sealing of the lower hold having been done by professional sealers engaged for that special purpose*, and the condition of the lower hold being a small V-shaped opening in which little coal could be placed, and *in the absence of any testimony* of any direction to go to that place. * * * *No direction can be attributed to the order of the boatswain*”—this finding, in view of the evidence of orders given, the existing conditions, and the situation of coal already trimmed in Compartment No. 2, is, we most respectfully contend, astonishing.

We hereby refer to the citation of evidence under the first, second and seventh errors assigned, as being indubitable as to the fact that the appellant and men working with him were fully justified; that “direction can be attributed to the order of the boatswain.”

IX.

The same disregard of facts as shown by the Honorable District Court is the misconception of not only the spirit and meaning, but the letter of the Act of March 4th, 1915, 38 Stat. 1185, com-

monly known as the LaFollette Act or Furuseth Law.

The text of Section 20 of the act is as follows:

Section 20: "That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be *fellow servants* with those under their authority."

The Honorable District Court finds that the act is "*merely* a provision fixing the status of injured seamen in *command of vessels* with relation to other employees on the ship."

It is a conceded fact that this act was enacted to change the rule of defense as to officers of ships being fellow servants of the injured seamen, as set forth in the *Osceola* case, 189 U. S., page 175.

That case held: First, that members of the crew, except perhaps the master, are, as between themselves, *fellow servants*, and hence seamen cannot recover for injuries sustained through negligence of another member of the crew beyond the expense of their maintenance and cure. Second, that a seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure whether the injuries were received by negligence or accident.

The change in the rule of defense as to officers being fellow servants of the injured seamen, in the LaFollette or Furuseth Law, Act of March 4th, 1915, 38 Stat. Sec. 1185, p. 153, is drastic and takes the very teeth out of the *Osceola* case. It certainly is much more than "merely a provision" fixing the status of seamen in command of vessels with relation to other employees of the ship. It reverses the rule of a leading case so effectually as to render any controlling authority of the case as nugatory.

X, XI, XII.

The errors of the Honorable District Court, as contended for and maintained by libellant in Assignment of Errors X, XI and XII, being cognate matters involve all the issues in the cause already specifically presented, and is here considered and discussed. The errors heretofore discussed are mainly those going to the findings of the Honorable District Court in the memo of decision; but as already shown the decision is referred to in, and a part of, the final decree; therefore all citations of evidence or authorities heretofore made under any specified error, is again referred to, cited and made under Assignment of Errors X, XI and XII.

SPECIFICATIONS OF ERROR X.

The Court erred in entering final decree dismissing.

We most earnestly contend that strong and altogether convincing evidence of appellant's cause was admitted as proof and did not in any way justify the Honorable District Court in dismissing the libel.

The gravamen of the libel is that contractual relations existed between libellant and appellant on February 21st, 1916, and the respondent, Alaska S. S. Co.; that on that day a violent explosion of coal gas occurred in Compartment No. 2 below 'tween decks in the lower hold of the S. S. Victoria, and that appellant was injured. All of the above is admitted by the pleadings.

That the explosion took place by reason of coal gas as above stated in an unventilated part of the ship; the coal when taken aboard was nearly fine dust, and was wetted down with water through a hose and of necessity packed tight; that appellant was seriously burned about the face, body and hands; the left hand being permanently injured so as to destroy his vocation in searfaring and from any manual labor; that appellant was engaged in the performance of duties specially assigned and

under the orders of the officers of the ship, and that appellant was without fault in the premises, has been safely and convincingly established by a large preponderance of the evidence.

That the explosion of coal gas occurred only in the hold below 'tween decks; the coal had been poured through the hatches into the hold until it filled the 'tween decks hatch, spread over 'tween decks and reached above the steerage deck, at Boat Harbor.

A space was left in the hold after partial trimming at said port; there were *no ventilators reaching below 'tween decks*; consequently the coal gas accumulated in a heated ship for about fifty hours.

TESTIMONY OF APPELLANT SORENSON:

“The coal was very fine and kind of wet.”
(Page 12, lines 28-30.)

“Atmosphere was warm * * * being *close to the boilers.*” (Page 19, lines 15-16.)

“Ventilators go through two decks * * * they finish underneath the steerage deck * * * to give steerage passengers air when steerage passengers sleep 'tween decks * * * steerage deck is second deck; * * * ventilators *go below steerage deck about three inches.*” (Page 19, lines 21-30.)

(Marks a little cross on each side hatch coaming.) “No ventilators in lower hold—not lower than ’tween decks.” (Page 20, lines 1-19.)

TESTIMONY OF BOATSWAIN EDWARD McDONOUGH:

(Examining blue prints, ventilators.) “Ventilators go only as far as ’tween decks.” (Page 56, lines 21-30.)

“Through the steerage deck * * * do go below steerage deck.” (Page 56, lines 21-30.)

“They do not go *below ’tween decks*.. * * * goes right down where steerage passengers sleep * * * that is, ’tween deck (pointing; explains the position of ventilators above ’tween decks * * * marks the place where the spare bow anchor is kept). (Page 57, lines 1-12.)

“Been in the hold (orlop deck) *don’t know of any ventilation in the hold*.” (Page 57, lines 25-30.)

“Orlop deck down here (showing it on blue print) is away below ’tween decks * * * not a tight deck * * * just loose planks laid down.” (Page 58, lines 1-11.)

TESTIMONY OF ROBERT JENSEN:

“Been a seaman about 15 years; * * * been seaman on Victoria; * * * made trip on Victoria as boatswain * * * well acquainted with her general equipment * * ventilators in No. 2 hatch * * *

they go as far as steerage deck * * * that is far as they go.” (Page 75, lines 27-30.)

“Go as far as steerage deck to give ventilation for steerage passengers.” (Page 76, lines 1-4.)

DEPOSITION OF CAPTAIN O'BRIEN, master of the ship:

“Wet the coal to keep down the gas * * * and to keep the gases from accumulating in the lower hold.” (Page 358, lines 1-7.)

“There was an explosion on the Queen of the Pacific (now Queen) in which four or five were killed from an explosion, of coal gas * * * was lying in Nanaimo or Departure Bay * * * about 35 or 40 miles from Boat Harbor.” (Page 358, lines 22-30.)

“Coal about 48 hours in the hold.” (Page 362, line 15.)

“There was a coal explosion, of course.” (Page 370, line 1.)

APPELLANT WAS PERMANENTLY INJURED.

TESTIMONY OF APPELLANT SORENSON:

“Both hands burned * * * face, elbows, neck and left shoulder * * * unable to close left hand * * * not able to hold on to a thing or do any work as a seaman any more * * * in weather like this (February) hands turn dark blue and fingers

still get more stiff.” (Page 15, lines 23-29.)

“Happened a year ago * * * India ink marks on back of hand burned off * * * burned picture of angel off * * * not same strength in either hand * * * when hospital nothing but red marks showed.” (Page 16, lines 1-21.)

(Explains photo of burns. Libellant's Exhibits Nos. 3, 4, 5, 6 and 7. Page 17, lines 1-9.)

“While in hospital, for 14 days given morphine three times a day to relieve pain * * * impossible to describe the pain * * * was so could not get rest after dressing sores until I got something to take pain away * * * was in hospital for seven weeks * * * unable to feed myself for five weeks.” (Page 18, lines 1-22.)

“Unable to longer do duty as a seaman; * * * many times a seaman *trusts his life to his hands.*” (Page 73, lines 1-10.)

TESTIMONY OF DR. C. S. LEEDE:

“Sorenson showed evidences of extensive burns about six or eight weeks ago when in first, and then second time in company with Dr. Sharples * * * extensive burns of the first and second degree, all over the face to the hair line and on the left shoulder, and the elbows, and had active fresh scars on the backs of both hands.” (Page 43, lines 18-30.)

“Skin of left hand between two fingers so drawn * * * preventing from opening and stretching the fingers apart * * * skin grown to the sinew * * * sinews on back of hand similarly grown to the bones in the middle of the hand, preventing closing it entirely * * * he could not make a fist * * * on other hand a slight web formation * * * as to future * * * scar tissue in the skin has a tendency to shrink * * * tendency is so great that vast and extensive adhesions take place in later years * * * the future of the right hand, it certainly will get no better * * * the left hand, probabilities are that it will get worse.” (Page 44, lines 1-30.)

“I think that the probabilities are that he will get worse in the left hand * * * skin is very poorly nourished * * * blood supply very poor * * * in an injury as an abrasion * * * if he bumps his hand the danger of infection would be greater * * * especially in his vocation as a sailor * * * salt water will probably chap that hand * * * make it impossible to follow his vocation without a great deal of distress and discomfort.” (Page 45, lines 6-20.)

“Don’t see how he could ever hold a rope in his left hand * * * don’t think send him into rigging

with that hand * * * don't see how he could take hold of small lines, which are in rope ladders * * * any abrasion of slightest character would bring about infection." (Page 45, lines 20-30.)

"Don't think he could get a position as a sailor in which he would have to handle ropes and go aloft * * * I think it will be impossible for him to follow that vocation." (Page 46, lines 28-30.)

CROSS-EXAMINATION:

"Was a ship's surgeon * * * about four years ago." (Page 46, lines 28-30.)

"I believe that a captain would think twice before taking a man on shipboard who is not able to hold himself evidently with his left hand in a storm * * * a captain would think twice before he would take risk of that man on his ship. (Page 51, lines 22-29.)

TESTIMONY OF DR. SHARPLES, witness for respondent:

"The injury is permanent." (Page 98, lines 26-27.)

DEPOSITION OF PETER IVERSON:

"Sorenson reached his hands up * * * so I got ahold of them to pull him out * * * *found that my hands had the skin from his hands* * * * it come off from the burns * * * skin come off in my fingers." (Page 151, lines 7-22.)

That appellant was engaged in the performance of his duties specially assigned, and was so engaged under the orders of the officers of the ship.

The testimony on this point is full and conclusive under the 1st, 3rd, 4th, 5th and 7th errors assigned as cited thereunder, and are hereby most respectfully referred to and again cited.

SPECIFICATIONS OF THE XI ERROR.

That the Court erred in refusing to grant a rehearing in said cause before entering the final decree, is manifest from the evidence submitted herein as cited under the different errors assigned, and it would be a mere repetition to do more than refer to the same as being cited hereinunder.

SPECIFICATIONS OF THE XII ERROR.

We again most respectfully contend and earnestly maintain that the Honorable District Court erred in refusing to enter a decree awarding damages to appellant, and adjudging the respondent, its servants, master and crew of the vessel at fault for said explosion and for the serious and severe injuries of appellant and his intense suffering.

A careful review of all the evidence, transcript of testimony, depositions and exhibits in the cause seems so overwhelmingly in appellant's favor that we again express our sense of the want of due con-

sideration by the Honorable District Court of the sworn evidence of witnesses and other evidence offered.

The appellant is justly entitled to an award as demanded in the libel in the sum of \$15,000.00.

He was twenty-four years old, in his twenty-fifth year; in the very prime of young manhood when stricken in the line of duty without fault on his part.

The testimony of Herbert A. Semon, insurance expert of the Prudential Life Insurance Co., shows that appellant, in robust health and without mental or physical defect at the time of his injury, would have an expectancy of life of 38 years more, and even earnings at the rate of but \$50.00 per month would amount to over \$22,500.00. (Attached at end of transcript of testimony.)

ARGUMENT.

The salient facts of this cause are not left in any doubt by either the evidence or the law.

An explosion of coal gas occurs on board of a ship, from an unventilated space, where appellant, an employee, was working in pursuance of the orders of the officers of the vessel.

Appellant is performing his duties in a natural and ordinary, usual and reasonable way, and with-

out fault on his part he is permanently injured in the left hand and otherwise burned about the body, face and hands, and suffers intensely from these injuries.

No contention is made by respondent as to the explosion, nor the injury, except as far as possible to minimize its severity with the view of abating an award for damages.

Appellant vigorously contends that the positive, direct, and overwhelming preponderance of the evidence sustains all the allegations of the libel and that he, in strict justice, is entitled to an ample award for injuries from this Honorable Court, even if he had failed in a degree to establish by direct proof of his cause; the law as to such character of explosion throws the *burden of proof* as to negligence upon the respondent.

PRESUMPTION OF PROOF ARISING FROM EXPLOSIONS.

If a proponent adduces evidence of facts giving rise to a presumption of law in his favor, then the *burden* of adducing evidence to the contrary is cast upon the opponent, and unless he discharges this burden by adducing evidence which tends to overthrow the presumption, the case will be disposed of by the Court as a matter of *law* in favor of the

proponent.

Hammon on Evidence (Ed. 1907), page 12.

The courts generally agree that, where contractual relations exist between the parties, as in cases of *common carriers*, proof of an explosion *carries with it* the presumption of negligence and makes a *prima facie* case.

Ruling Case Law, Vol. 11, Sec. 23, page 670.

Judson vs. Giant Powder Co., 107 Cal. 549;
40 Pac. 1020; 29 L. R. A. 718.

This case holds that a presumption of negligence arises from the fact of an explosion in a dynamite factory, where there is evidence that, if it is carefully handled it will not explode.

Beals vs. Seattle, 28 Wash. 593 (at page 603).

This case holds that, where a traveller upon a highway (streets of Seattle) is injured as the result of the explosion of an *unseen instrument* within the area of the street over which a city has control, a *prima facie* case of negligence is established against the city, regardless whether contractual relations exist between the city and the person injured.

The above cases establish the doctrine that in cases of explosion, where a *prima facie* is made out, that it is incumbent upon the defendant (respondent-appellee herein) to prove that the Alaska Steam-

ship Co. was not negligent.

No where in the evidence submitted by the appellee does any attempt appear to be made that the officers and servants of the Alaska S. S. Co. on the S. S. Victoria were not negligent in the condition of the ship as to unseaworthiness, in the failure to supply and keep in order proper appliances.

The officers gave the men open, unguarded lanterns to go into a place where fine coal, almost dust, was poured without ventilation.

The master knew that just such an explosion had happened before on the "Queen of the Pacific" in which four or five persons were killed under similar circumstances, similar character of coal, mined from the same district.

The ship was equipped with electric cluster lights with extension cords to be used for just such purposes as these men were employed at at the time of the explosion, but were not used until after appellant had been terribly burned.

Liability of vessel for injury to a seaman depends upon the unseaworthiness of the ship, or her failure to *supply and keep in order proper appliances*.

ORDERS TO TRIM COAL.

The citation of evidence under specification of

first error assigned established the fact that ample space for tons of coal was in the lower hold of Compartment No. 2, below 'tween deck, at the time of the explosion. Is not the fact that after the explosion in which appellant was injured, the officers of the Victoria ordered the crew to trim the cone-shaped pile, which filled the 'tween decks hatch in the identical space below 'tween decks in which the explosion occurred, a full recognition of the fact that that was the proper place to store the coal?

All the evidence in the case would seem in no small degree to manifest to this Honorable Court that the seventh error of the Honorable District Court in finding that "the contention of libellant would have more force, if the libellant was at a place where he was directed to be, is without either evidence to support it or reason to sustain it.

Let us critically examine the evidence upon this point which appellant earnestly contends shows that he was not only strictly in the line of his duties at a place where he was directed to be, but also intelligently and faithfully executing the orders of the boatswain as to where he should trim the "cone-shaped pile" left in 'tween decks hatchway.

In order to show that libellant's contention is absolutely right, we take the liberty of repeating the

evidence upon this question.

LIBELLANT SORENSON TESTIFIES:

“Received orders from the boatswain * * * to go into No. 2 and trim the coal away, and ‘leave as much space as possible in the fore part of ’tween decks because we are going to Bellingham to take in freight, and to trim it up in the wings and the after part (of ’tween decks) * * * to do away with it the best way you possibly can.’ ” (Page 8, lines 23-29.)

“Me and several others were told to go into No. 2 hold and trim coal * * * the orders were to trim the coal in the wings and after part, to leave the fore part clear.” “We were told to do away with it *the best way be possibly could* * * * by the boatswain of the ship.” (Page 14, lines 1-10.)

CROSS-EXAMINATION:

“Was told to do away with the coal the best way *I possibly could* and that (below ’tween decks) *was the best way* * * * to go down to get plenty of room ’tween decks for freight, and get all the coal in the lower hold to make room.” (Page 34, lines 27-30.)

“It was the best way to get lots of room for *freight* ’tween decks.” (Page 35, lines 15-18.)

“The only place to put this hump was in there (lower hold below ’tween decks).” (Page 40, lines

1-3).

DEPOSITION OF SAMUEL DONOVAN:

“Boatswain told us to go down and trim the coal as best we could.” (Page 133, line 21.)

“We told him we could not get any more (in the wings) and the best thing to do is to try and get into the hold.” (Page 134, lines 26-29.)

“He says, *do the best you can*; we have got to get the *hatch clear*.” (Page 134, lines 8-10.)

“We told the boatswain about it (trimming in the lower hold) *before we done it*.” (Page 138, line 30.)

“He said, ‘Do the best you can’ * * * that is what he told us to do—the *best we could*. He did not care where we put it so long as we got the *hatches on*.” (Page 141, lines 5-13.)

DEPOSITION OF PETER IVERSON:

CROSS-EXAMINATION:

“We had orders to get it away * * * the easiest way we could * * * that was the easiest way * * * because all kinds of space there (lower hold) * * * orders were to trim coal into the wings and the *best way we could*.” (Page 176, lines 3-11.)

“The boatswain ordered us to go into the lower hold and trim coal with the open lanterns.” (Page 187, lines 28-30.)

“Orders we got from the boatswain to go there and trim coal to make space for cargo, and go down and trim it the *best way you know how.*” (Page 189, lines 12-16.)

TESTIMONY OF EDWARD McDONOUGH :

“Sent Sorenson and most all the sailors to trim coal in Compartment No. 2 * * * and each man had lantern * * * they were already lit that morning * * * each man had a shovel and a lantern * * * orders from the chief officer was that they should shovel the coal away from the hatch in the wings in place so that we could get cargo in that hold * * * *any place they could shovel it* to get freight in the hold.” (Page 54, lines 2-27.)

Q. “A number of men have sworn here that your orders were to go down and trim the coal in between decks so as to get space to take the cargo in, and *do the best you could* * * * Do you remember whether or not that is true?”

A. “I might have said that if the boys said so.” (Page 54, lines 28-30; page 55, lines 1-2.)

CROSS-EXAMINATION :

“The order that I passed to the men was, I said to the boys, I said, Go down in No. 2, I said, and shovel that coal away from the hatch anywhere in the wings so that we can receive freight down

there.” (Page 61, lines 1-5.)

“Did not give them any orders to go down to No. 2 hold; it was No. 2 hatch I gave them orders to go down * * * knew on the morning of the accident that these men had taken an open lantern in the lower hold.” (Page 65, lines 7-10.)

RE-DIRECT EXAMINATION:

“I told the men to trim the coal in the wings, *or anywhere*, I guess something like that; I might have.” (Page 69, lines 26-27.)

EDWARD McDONOUGH, recalled by Proctor Bogle:

“After the explosion not on ’tween decks, but down in the hold, *I worked underneath ’tween decks between the coal and the ship’s side.*” (This District Judge’s V-shaped hole.) (Page 78, lines 18-28.)

“Hold (No. 2 hatch) was filed to a certain extent, but when we *went down there after the explosion happened, I went down there and walked around.* I am not sure of any space on ’tween decks between the coal and ship’s sides, but *down in the lower hold where I walked around there was.*” (Page 79, lines 1-10.)

“There was plenty of space there (lower hold) and naturally enough I went around down in the lower hold * * * was the *natural place* to put this hump of coal here in that space * * * if a man

wanted to make easy work of it, naturally enough he would put it down there below."

Q. "Was that the proper place to put it?"

A. "This is the proper place, if a man is shoveling coal."

THE COURT: "Where was the proper place?"

A. "To put it down below in the sides of the ship." (Page 80, lines 21-28.)

THE COURT: "Was that the proper place to put it?"

A. "*The proper place to put it was down below.*" (Page 81, lines 1-2.)

(Proctor Bogle) Q. "Why do you say, then, that it was the proper place to put it below?"

A. "Well, the idea is this: if there is space down in the hold, naturally you are going to fill the lower hold." (Page 81, lines 1-20.)

Does it not appear from this testimony that the appellant was wholly within the direct and scope of the orders of the officers of the ship as to "the place where he was directed to be?"

NEGLIGENCE.

The ship was *unseaworthy* by reason of the fact that there was no ventilation in the lower hold, Compartment No. 2, where the explosion occurred.

The testimony cited under the sixth error as-

signed is full and complete that no ventilation existed in the lower hold for about fifty hours, and all citations under said sixth error are hereby referred to and recited upon this point.

Further, negligence is emphasized by the recognition of their former negligence, in order *no more lanterns* to be taken down there, and instead to use the electric cluster lights.

DEPOSITION OF PETER IVERSON:

“The second mate was in charge after the accident.” (Page 157, lines 1-7.)

“Used electric lights to trim coal in the lower hold ’tween decks, cluster lights.” (Page 157, lines 15-18.)

“After the explosion guess they got scared to send us down there with lights like that” (lanterns). (Page 157, lines 24-30.)

“There was orders then; I don’t know whether from the captain; to use no more lights down there whatever * * * took ventilation holes off the corners of the hatch so that there would be plenty of air down there.” (Page 157, lines 24-30.)

Why was not this precaution of using electric lights exercised before appellant was put out of commission?

Captain O’Brien, master of the vessel, had been

long years in service as shipmaster, knew of similar explosion on "Queen of the Pacific," in which several human lives were lost, and personally ordered this coal, nearly dust, to be wetted, to *keep down the coal gases*. This alone shows he knew that coal gases would accumulate.

DEPOSITION OF CANTAIN O'BRIEN :

"Wet the coal to keep down gases, and to keep gases from accumulating in the lower hold." (Page 358, lines 1-7.)

ASSUMPTION OF RISK.

"It is fundamental that a servant on accepting an employment, assumes all the ordinary and usual risks and perils incident to the employment, as well as all risks which he knows, or in the exercise of reasonable care may know exist.

"But the *exception is fundamental*, and as well settled as the rule, that the servant does not assume such risks as are created by the master's negligence, nor such as are latent, nor such as are discovered only at the time of the injury."

The Themistocles, 235 Fed. Rep. 81.

This is one of the very latest cases involving the issues in the case at bar, and applied to the established facts, we contend is conclusive of appellant's rights to an award for his injuries.

Appellant did not know of coal gas in the hold of Compartment No. 2, and the presence of gas was due to the unventilated space in the ship, which the master's experience and knowledge could easily have prevented the explosion by the use of the electrical equipment of the vessel; the presence of coal gas was, as far as the appellant is concerned, unquestionably a *latent fact*, and he only knew of its presence when the explosion took place.

The case of *McGill vs. Michigan S. S. Co.*, 144 Fed. 788, bears a close resemblance to the cause at bar. There the dangerous agency was crude oil in the vessel's tank and the action of giving off gases was not a matter of common knowledge among the workmen, but was a matter familiar only to expert oil men who should have anticipated the danger. Here the agency was coal confined without ventilation and its action in giving off gases was not known to libellant, but was well known to the captain of the *Victoria*, who had previously known of a fatal experience with a similar coal explosion and should have foreseen the explosion.

BOATSWAIN OFFICER OF SHIP.

In the case of *The Colusa*, the U. S. District Court of Northern District of California, First Division, decided May 14th, 1917, No. 16129: "The

boatswain of a ship is held to be a seaman in command, construing the Act of March 4th, 1915, Chap. 153, 38 Stat. 1164, commonly known as the LaFollette or Furuseth law. Adv. Sheets, July 26th, 1917, Fed. Rep. Vol. 241, page 968."

In the case at bar, Edward McDonough, a witness in this cause was the boatswain of the S. S. Victoria, and gave orders and superintended the trimming of the coal in Compartment No. 2, where appellant was injured.

In conclusion, there would seem to be no doubt as to the appellant being single-minded in *doing the best he could*.

He knew that ample space existed in the space below 'tween decks hatch; that the boatswain wanted the hatch covers of 'tween decks on to use as space for freight; that the wings and aft 'tween decks was full so that the coal ran back upon the shovellers, and the natural and proper place for the hump in 'tween decks hatch was in the space below.

What reasonable man under the orders of the boatswain, to "trim it anywhere" and the requirement for freight space, but who would have done his best to get rid of the hump of coal, for the benefit of the ship in the most expeditious, natural and proper place—in the lower hold of the ship?

It does seem that he employed only an honest effort to serve his employers within the line of his duties and the orders of his superiors.

In conclusion, seeking only that the broad rules of justice which are administered in a Court of Admiralty, be given his cause, the appellant most respectfully submits that he is entitled to the award claimed herein.

JAMES B. METCALFE,
J. VERNON METCALFE,
Proctors for Appellant.

No. 3021

IN THE

United States Circuit
Court of Appeals

FOR THE NINTH CIRCUIT

HENRY SORENSON,

Appellant,

vs.

ALASKA STEAMSHIP COMPANY, a Corpora-
tion,

Appellee.

APPEAL FROM THE UNITED STATES DIS-
TRICT COURT, DISTRICT OF WASH-
INGTON, WESTERN DISTRICT,
NORTHERN DIVISION.

BRIEF OF APPELLEE.

FILED

SEP 15 1917

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Seattle, Wash.

IN THE
**United States Circuit
Court of Appeals**
FOR THE NINTH CIRCUIT

HENRY SORENSON,

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vs.

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tion,

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APPEAL FROM THE UNITED STATES DIS-
TRICT COURT, DISTRICT OF WASH-
INGTON, WESTERN DISTRICT,
NORTHERN DIVISION.

BRIEF OF APPELLEE.

Appellee, Alaska Steamship Company, has filed a motion to dismiss the appeal herein, or to affirm the decree of the Court below, on the grounds (1) that the record has not been printed; (2) that no copies of the record, printed or otherwise, have been served upon appellee; and (3) that the transcript of record is incomplete, in that it does not contain the

testimony taken in open Court, the same not having been certified by the Court below.

Appellee feels that this motion is well taken and must be granted by this Court.

Without waiving this motion or any of appellee's rights thereunder, we desire, in case this Court should deny said motion, to present this brief on the merits, in so far as it is possible to brief the case in the absence of any copy, printed or otherwise, of the record on appeal.

This is an action *in personam* for personal injuries received by appellant while employed as a seaman aboard the steamship "Victoria," owned and operated by respondent. The libel alleges that a few days previous to February 21, 1916, this steamship had taken aboard a cargo of coal in bulk at Boat Harbor, B. C. That such coal was loaded in the different compartments of said vessel so that Compartment No. 2 was filled and that "*no more coal would pass into the hold*" (paragraph V). That a pile of coal was loaded in the 'tween decks of Compartment No. 2, entirely covering the hatch between the lower hold and the between decks, so that the lower hold was shut off without ventilation. It was further alleged that said coal was damp and dusty, and being permitted to remain in such condition until February

21st, dangerous and explosive gases were found in the lower hold, which fact was unknown to appellant. The negligence charged against appellee, as contributing to the accident, was first, that appellant was *ordered* by the officers of the ship to trim the coal in No. 2 between decks *into the lower hold*, and, second, that appellee furnished appellant with an open lantern *to use in the lower hold*, which lantern upon coming in contact with the gases in the lower hold caused an explosion, with consequent injuries to appellant.

The allegations of negligence were denied in appellee's answer and contributory negligence on the part of appellant and negligence of a fellow servant affirmatively pleaded.

The case upon the pleadings presented a clear cut question of fact as to whether or not appellant was *ordered* to go into the lower hold and if so whether he was furnished with a lantern *to use in the lower hold*.

The case was tried in open Court, the witnesses being examined orally in the presence of the trial Judge, who had the opportunity of seeing the witnesses and judging of their credibility.

At the conclusion of the trial, the lower Court reserved his decision and on February 20, 1917, filed

his memorandum decision, which, for the sake of convenient reference, we will set out in full:

"The testimony shows that several days previous to the 21st day of February, 1916, the steamship 'Victoria' was lying at Boat Harbor, British Columbia, Canada, loading coal in the hold of the vessel from bunkers by pouring it through hatch No. 2 whence it fell through similar hatchways in the steerage deck and on the deck above the lower hold; that the hatchways were of the same size and located one directly above the other; that the coal was poured through the hatches continually to the lower hold, where fifteen men were stationed around the hatch and shoveled the coal to the sides of the vessel and around the hatch until all of the space from the sides of the vessel and around the hatch had been filled, so that the coal rolled to a line immediately below the sides of the opening of the hatch; whereupon the men came to the between decks and permitted coal to pour through the hatch into the lower hold until the hatch was filled and was sealed by the professional sealers who were in charge of loading the coal. That at the time the hatch was sealed, a circular 'V' shaped opening was formed around the hatch, about five feet wide at the top and about four or five feet deep at the deepest point. When the lower hold was filled and the hatch sealed, about twenty or twenty-five tons of coal was dumped into the hatch, the apex of this coal reaching to a point above the level of the steerage deck. This apex was trimmed down and the steerage hatch cover placed over the hatch, and the vessel proceeded thence to Seattle. On the morning of the 21st of February, 1916, at 7 o'clock a. m., libellant was ordered by the boatswain into the between decks with other seamen to trim this pile of coal into the wings of the

'tween decks, and aft of the hatch of the 'tween decks, leaving a small space for an additional cargo. Libellant testified that they were directed to do this work in the best way they could. The boatswain testified that the order was 'to go into the 'tween decks and trim the coal into the wings and aft.' The testimony further shows that electric lights were furnished on the boat, and that lanterns were also furnished. These lanterns were trimmed and lighted by persons employed on the vessel, and placed in suitable positions for use; that no specific order was given to take the lanterns instead of using the electricity. The lantern was taken by libellant and his fellow servants into the 'tween decks and hung at places suitable to shed light upon the place where they were working. The coal, instead of being thrown to the sides of the vessel in the 'tween decks, was thrown to a point about half way between the hatch and the side of the vessel, and when the place to which it was thrown had been filled to the steerage deck, the coal rolled back to the place from which it had been shoveled. An open space still remained from the sides of the ship to the place where the coal was thrown of some six or eight feet from the full space between decks. The libellant and fellow seamen, instead of shoveling the coal to the sides of the vessel and filling the wings and aft, dug a hole through the hatch leading to the 'V' shaped opening in the hold of the vessel, and the libellant being the smallest man of the seamen, went through this opening thus made into the open triangular space, and while there, asked that a light be handed him; whereupon a light was passed to him by a fellow seaman, and when taken into this space the explosion followed. There is some testimony with respect to the defective ventilation of the hold of the ship. The testimony further shows that an explosion from coal gas within the time that this

coal was loaded upon the vessel was an 'unusual and unheard of occurrence.' In view of the conclusion which is forced from the testimony which is before the court, it is not necessary to discuss the ventilation of the hold of the ship.

"It is fundamental that a servant assumes all of the ordinary and usual risks and perils incident to which he has accepted employment, and also risks which reasonable care would disclose to exist. The servant does not assume risks that are created by the Master's negligence; nor such as are latent, and not discovered until the time of the injury. *The Themistocles*, 235 Fed. 81.

"It is contended by the libellant that the explosion being unforeseen and unexpected in its nature, and occurring in the manner in which this transpired, that negligence would be presumed, if unexplained, and the burden is cast upon the respondent to satisfactorily explain. *Beall v. Seattle*, 28 Wash. 593; *Agnew v. U. S.*, 165 U. S. 36.

"The contention of the libellant would have force if the libellant was at a place where he was directed to be. The testimony, I think, is conclusive that the trimming of the lower hold had been fully completed by professional trimmers at Boat Harbor. I think all of the circumstances confirm the positive testimony of the respondent that no authority was given to the seamen to disturb the lower hold. The acts with relation to the sealing of the lower hold having been done by professional sealers, men engaged for that special service, and the condition of the space in the lower hold being a small 'V' shaped opening in which but little coal could be placed, in the absence of testimony of any direction to the men to go into the place, I think the fact is conclusively established that no direction can be attributed to the order of the boatswain, any reasonable construction of which would lead a man into the lower hold, and this is further confirmed by the

large space into which the coal could be placed on the 'tween decks. The act of libellant in going into this small space in the hold of the ship was an act purely voluntary, without suggestion on the part of his superiors, and libellant is not entitled to recover an indemnity for negligence of the Master upon this occasion. Recovery, however, may be had for maintenance and cure. It is the law of the sea that recovery may be had for wages, maintenance and expenses of cure by a seaman injured on a vessel in the service of which he is engaged. *The Osceola*, 189 U. S. 158. It is the uniform rule of admiralty that a seaman injured in the service of a ship is entitled to maintenance and cure and wages, at least to the end of the voyage, irrespective of the question of negligence. *The Santa Clara*, 206 Fed. 179.

"The Act of March 4, 1915, 38 Stat. 1185, is merely a provision fixing the status of injured seamen in command of vessels with relation to other employees on the ship, and provides that 'seamen having command shall not be held to be fellow servants with those under their authority.'

"No recovery can be had for indemnity, and the only liability which exists is for any unpaid wages, and for maintenance and cure."

After the filing of this decision, appellant moved for a rehearing, which was granted and the case was again fully argued, at the conclusion of which, the lower Court adhered to his decision of February 20th, 1917, and entered judgment of dismissal, excepting as to maintenance and cure which was allowed appellant. This appeal was taken some five months later.

As this appeal, if allowed, presents questions of fact only, this Court will readily recognize our diffi-

culty in preparing this brief, when it considers that the case was tried below, in open Court, on January 30 and 31, 1917, and that since said date neither appellee, nor its proctors herein, have been served with or had an opportunity of reading the stenographer's transcription of such oral evidence, only two copies of which we understand have been transcribed for the purpose of this appeal. Nor have we been refreshed any by a careful reading of the so-called "*digest*" of testimony set forth in appellant's brief. This practice of garbling testimony to suit a litigant's needs has never been encouraged by appellate courts. Appellant eliminates essential portions of the answers of witnesses and by such elimination attempts to connect up unrelated sentences with the very apparent purpose of misleading this Court as to the real essence of such witnesses' testimony, the net result being an undigested mass of no benefit whatsoever.

Fortunately, we are relieved of the burden of attempting to point out the inaccuracies and misstatements contained in Appellant's Brief.

As we have heretofore stated, this cause was tried in open Court, practically all of the witnesses having appeared and testified before the trial Judge. If the trial Court's findings as to the facts are accepted as true, his conclusions of law will not be disputed. In fact, we understand appellant's sole contention on

this appeal to be that the trial Court's findings of fact are contrary to the evidence.

The rule announced by this Court in *The Alijandro*, 56 Fed. 621, at page 624:

"The rule is well settled in cases on appeal in admiralty when the questions of fact are dependent upon conflicting evidence, the decision of the District Judge who had the opportunity of seeing the witnesses and judging their appearance, manner and credibility will not be reversed unless it clearly appears that the decision is against the evidence. *The Albany*, 48 Fed. 565, and authorities there cited,"

has been uniformly followed by this Court in later decisions.

Whitney v. Olsen, 108 Fed. 292.

Jacobsen v. Lewis etc. Co., 112 Fed. 73.

Alaska Packers' Ass'n. v. Dominico, 117 Fed. 99.

The Oscar B., 121 Fed. 978.

Paauhau v. Palapala, 127 Fed. 920.

The Samson, 217 Fed. 344.

Stern v. Fernandez, 222 Fed. 42.

The Dolbadarn Castle, 222 Fed. 838,

and has recently been reaffirmed and followed in the case of *The Hardy*, 229 Fed. 985, at p. 986 (opinion by Circuit Judge Gilbert):

"While there are many features of the evidence which tend to discredit the testimony of the officers and men of the *Hardy*, and tend to prove that on the night of the 5th, or during the daylight of the 6th, the lantern on the barge might

have been lighted without danger to the men, and that in fact no watch was kept of the barge on the night of the 6th, we are not convinced that the record is such as to take the case out of the well settled rule, which has been followed by this and other Courts, that in cases on appeal in admiralty when questions of fact are dependent upon conflicting testimony, the decision of the District Judge, who had the opportunity to see the witnesses and judge of their appearance, manner and credibility, will not be reversed, unless it clearly appears to be against the weight of the evidence. *The Alijandro*, 56 Fed. 62, 6 C. C. A. 54; *Perriam v. Pacific Coast Co.*, 133 Fed. 140, 66 C. C. A. 206; *Peterson v. Larsen*, 177 Fed. 617, 101 C. C. A. 243,"

and such is the uniform rule in other Circuits.

The Glendale, 81 Fed. 633.

The Sappho, 94 Fed. 545.

The Frey, 106 Fed. 319.

Lazarus v. Barber, 136 Fed. 534.

Memphis etc. Co. v. Hill, 122 Fed. 246.

The Elenore, 217 Fed. 753.

That the above rule is applied to personal injury causes brought in admiralty is held in *The Elenore*, 217 Fed. 753.

Appellant's contention seems to be that the decree below should be reversed, if there was evidence to sustain appellant's action. Under the above rule, however, the sole question before this Court is whether or not there is evidence to sustain the lower Court's findings. As to this we think there can be no doubt.

Much of the evidence produced in open court is

not referred to in appellant's brief. Whether it is in the record or not we have no way of ascertaining, in the absence of any copy thereof.

It will be noted that appellant alleges in his libel that Compartment No. 2 was filled and that "no more coal would pass into the hold," which is conclusive on his present argument that the lower hold was only partially filled. Sufficient to say that the master, mate and a Mr. Muirhead (charterer) all testified that the lower hold had been loaded by professional trimmers at Boat Harbor, B. C., so far as it was possible to stow coal therein and still permit space for the trimmers to work in such hold. The space occupied by such trimmers is the "V" shaped space referred to by the lower Court. After the hold had been finished only twenty to twenty-five tons of coal remained on the dock for loading; the trimmers were called out of the hold and the hold was "*sealed*" by running this twenty to twenty-five tons into the hatch opening between the 'tween decks and the lower hold, which coal filled the hatch opening and spread out in the 'tween decks in a pyramid, the apex being some six feet high. These facts are not disputed, nor do we consider them of importance on this appeal. If the appellant was not ordered to work in this lower hold with an open lantern, the conditions in such lower hold do not enter into the case.

It is elementary law that a Master's duty in respect to furnishing his servants a safe place in which to work extends only to such part of his premises as he has prepared for the use of his servant, or into which he has ordered his servant to go.

Labatt's Master and Servant, §1558.

Note (6) and cases there cited.

On the question of the orders which appellant received on the morning of the accident the evidence, as we clearly remember it, is conclusive. By reference to brief written by us immediately after the trial below for use of the trial Judge, we find that appellant himself testified that on the morning of February 21, 1916, he was ordered by McDonough, the boatswain, to go into the between decks and trim this pyramid of coal into the *wings of the between decks and aft of the hatch on the between decks*, and leave a small space forward for additional cargo. He testified that he was to do this work in the *best way* he could, but in view of his express orders as to his place of work this qualification is of no avail. The Boatswain McDonough testified, on behalf of appellant, that the order which he received from the mate Johnson was to have the seamen, including appellant, "*go into the between decks and trim the coal into the wings and aft*" *on the between decks*, and that he gave that order to the seamen, including appellant. This order

is confirmed by Captain O'Brien, master of the "Victoria," who gave the order to the mate, and is also confirmed by the mate who passed the order to the boatswain. In view of appellant's admission that this was the order given the seamen by the boatswain, the evidence would seem not only to confirm the lower Court's finding, but in fact to be uncontradicted.

Appellant's only excuse for going into the lower hold was (according to this testimony) because of the fact that the between decks were filled and the coal was running back into the hatch. That this testimony is absolutely untrue is shown by the testimony of Mate Johnson that the between decks would hold from 300 to 400 tons; that after the accident he walked between the coal pile around the hatch and the sides of the ship, which was entirely clear of coal; by the testimony of Muirhead (charterer) that the between decks would hold 450 tons of coal, and by the testimony of Boatswain McDonough (appellant's witness), that the 'tween decks would hold 250 tons of coal and that after the accident he went into the between decks and walked between the pile of coal around the hatch and the sides of the ship, as well as in the after part of this deck. As there were only from 20 to 25 tons of coal in the between decks originally, it is clear from this testimony that there was ample space in the between decks to stow this amount of coal without

resorting to the lower hold. The lower Court's finding on this point is also amply sustained by the testimony and is, in fact, not contradicted.

On the remaining point as to the use of lanterns, the testimony is even more conclusive in favor of the lower Court's finding. If, in fact, the appellant was not ordered into the lower hold, and he does not testify that he was so ordered, it is apparent that he could not have been directed to use an open lantern in the lower hold. As we remember the testimony, not a single witness testified that the seamen were ordered to use these lanterns in the lower hold.

The lower Court's findings that:

"The testimony further shows that electric lights were furnished on the boat, and that lanterns were also furnished. These lanterns were trimmed and lighted by persons employed on the vessel and placed in suitable positions for use; that no specific order was given to take the lantern instead of using the electricity. The lantern was taken by libellant and his fellow servants into the 'tween decks and hung at places suitable to shed light upon the place where they were working" (that is, in the 'tween decks),

is supported by the uncontradicted evidence.

Appellant makes some further contention that the vessel was unseaworthy because her lower hold was unventilated. As stated by the lower Court, this point could only enter into the case upon a showing

that appellant was *ordered* into the lower hold. As a matter of fact, the vessel's lower hold was properly ventilated. The only positive testimony on this point is that of Captain O'Brien, whose deposition is before us. He states (page 11) that there were two ventilators leading into No. 2 hold, of about 20 inches diameter, being large ventilators. The other witnesses had never made an examination and naturally were not in a position to testify positively on this point.

In view of the above mentioned rule, we do not see that any further discussion of the testimony is necessary. As stated by the lower Court, his findings are "forced from the testimony"—no other conclusion could be reached.

We will briefly note appellant's argument on the "legal" questions presented. His whole argument is based upon the erroneous presumption of fact that appellant was in the hold "working in pursuance of orders of the officers of the vessel," and that he was injured "without fault on his part." That this presumption is erroneous has been held by the lower Court whose findings are amply sustained by the evidence in the case.

Appellant contends (pp. 42-43 of his brief) that an explosion of itself creates a *prima facie* case of negligence on the part of the master. The authorities cited do not sustain appellant's contention.

It has been held by some courts that the doctrine of *res ipsa loquitur* extends to cases of boiler explosions and explosions of dynamite, powder, etc. The theory of these cases is that boilers, dynamite and other high explosives do not ordinarily explode when proper care has been exercised in handling and controlling them, and hence in the case of such an explosion where the thing causing the explosion is ordinarily under the control of the defendant, in the absence of any explanation by the defendant, there is a *prima facie* case of negligence on its part. Such a doctrine has never been sustained, excepting in cases where the instrument causing the explosion is ordinarily *under the control of the defendant*, and even in such cases it is a mere presumption and is subject to explanation or proof.

Lykiar Doupoulo v. New Orleans, etc. Co., Vol. 22 Am. & Eng. Ann. Cas. 977.

Even this doctrine is not uniformly applied by the courts. See note to the last case.

Such a doctrine, however, is never applied in cases of an accident where the instrumentality is either in whole or in part under the control of the servant or his co-workers.

“Plaintiff contends that the doctrine *res ipsa loquitur* applies to the facts in this case and seeks to justify his contention by citing many cases. In

all of the cases cited the courts have held that the mere fact of the accident unexplained is some evidence of negligence on the part of the defendant. The rule established in those cases is as follows: 'When the thing causing the injury is shown to be under the control of the defendant, and the accident is such as in the ordinary course of business does not happen if reasonable care is used, it does, in the absence of explanation by the defendant, afford sufficient evidence that the accident arose from want of care on its parts.' *The reason why this rule of law is not applicable to the case at bar is because of the fact that the thing causing the accident, namely, the oil being poured into the lamp, was in exclusive control of the plaintiff rather than of the defendant, and therefore the reason for the rule does not exist.*" (Italic ours.)

Courtney v. New York Etc. Co., 213 Fed. 389.

"Authorities are scarcely needed to support the propositions that except in rare cases (of which this is not one) negligence cannot be inferred from the mere happening of an accident, and cannot be conjectured but must be proved. We may refer, however, to the following decisions: *Patton v. Railway Co.*, 179 U. S. 663, * * * *Oil Company v. Van Elderen*, 137 Fed. 571, * * * *Clare v. Railroad*, 167 Mass. 39, * * * 44 N. E. 1054; *Leary v. Railroad*, 173 Mass. 373, 53 N. E. 817; *Warner v. Railroad*, 178 Mo. 125, 77 S. W. 67, and cases cited in 29 Cyc. 631, Par. 2, Note 52."

Pittsburg Coal Co. v. Myers, 203 Fed. 221, at page 224.

In any event, this doctrine could not apply to the case at bar for the reason that the testimony affirmatively shows that the accident occurred by reason of

the appellant taking an open lamp into the lower hold, contrary to express orders. The presumption of the above case as applied to injuries occasioned to third parties, to whom appellee owed some contractual duty, has never been extended to the relation of master and servant where the dangerous agency was in whole or in part under the control of the servant.

It will further be noted in this connection that appellant has neither alleged nor proven that appellee knew or should have known of the presence of coal gas in the hold.

“In order to make the complaint proof against a demurrer, it is incumbent upon the plaintiff to allege that the use of the oil furnished to the plaintiff and the manner in which he claimed to have used it, as set forth in the complaint, was likely to cause an explosion and that the defendant knew or ought to have known of the fact.”

Courtney v. New York etc. Co., 213 Fed. 388.

Appellant seems to contend that because Captain O'Brien testified that he had heard that an explosion occurred on the “Queen of the Pacific” some twenty years ago, he was bound to anticipate an explosion on this occasion. One explosion in twenty years, the circumstances of which are not shown, does not put appellee upon notice of the dangerous character of coal dust. All of the evidence in this case establishes that such an explosion as occurred on the “Victoria” was an “unheard of occurrence.” But what-

ever the fact may be in this respect, we do not see its materiality here. If appellant had been *ordered* to work in the hold a different question would arise, but such is not the case. He went into the hold voluntarily and without notice to, or knowledge of, appellee. In the absence of negligence on the part of appellee, there can be no recovery.

McKenna v. Union S. S. Co., 215 Fed. 284.
Labatt Master and Servant, pp. 2488-2490.

The case of *The Themistocles*, 235 Fed. 81, cited by appellant, merely holds that a servant does not assume the risk of a "dangerous place" in which he is *ordered* to work, where the danger was *known* to the master but unknown to the servant. Such is undoubtedly the rule but we fail to see its application in this case.

The case of *McGill v. Michigan S. S. Co.*, 144 Fed. 788, decided by this Court in 1906, is somewhat similar to *The Themistocles*, *supra*, in that it involves the negligence of a master in ordering a servant into a place of danger of which the master had or should have had knowledge, but of which the servant had no knowledge.

"We do find, however, that the steamship company was negligent in putting in the fuel tank oil of the quality of that which it used, and fuel oil, no matter what its quality, during the progress of the work on the tanks and at a time when

it knew that work remained to be done in drilling holes into the tank for the insertion of top bolts to secure the stanchion, without any warning to the workmen of the Fulton Iron Works."

We do not see that it has any application here.

The last point raised by appellant should in fact have been first presented, as in our opinion it is determinative of appellant's case.

Under the admiralty law as laid down in *The Osceola*, 189 U. S. 175, all the members of a ship's crew, with the possible exception of the master, are held to be fellow servants and "hence seamen cannot recover for injuries sustained through the negligence of another member of the crew, beyond the expense of his maintenance and cure." The only exception to this rule is where the seaman is injured "in consequence of the unseaworthiness of the ship or a failure to supply and keep in order the proper appliances appurtenant to the ship."

In the case at bar appellant contends that the presence of coal gas in the lower hold rendered the vessel unseaworthy under the above rule. We do not think this contention worthy of much comment. The presence of gas in a portion of the ship into which appellant was not ordered to go could not be termed unseaworthiness "in consequence" of which he was injured.

Appellant, being a seaman at the time of receiving his injuries, is restricted in his recovery to maintenance and cure (which was allowed by the lower Court), unless the admiralty rule as announced by the Supreme Court in the above case has been modified by the Act of March 4, 1915, 38 Stat. 1185, which provides that "seamen having command shall not be held to be fellow servants with those under their authority."

The lower Court held, although it was not necessary to its decision, that this act "is merely a provision fixing the status of injured seamen in command of vessels with relation to other employees on the ship," which construction in our opinion is correct.

It is not necessary, however, to base the decision in this case on the construction of this act, as appellant has entirely failed to prove negligence on the part of the appellee upon any theory whatsoever, while the active negligence on appellant's part is established beyond any controversy.

In conclusion, we wish to apologize to this Court for our failure to give any citations to the testimony of the various witnesses to which we have referred, which failure is due to the fact that we have not been served with any copy, printed or typewritten, of the record in this case.

We respectfully submit that the findings of the lower Court are fully sustained by the evidence in this case and that his conclusions therefrom are correct, and that the decree below should be affirmed.

Respectfully submitted,

W. H. BOGLE,

CARROLL B. GRAVES,

F. T. MERRITT,

LAWRENCE BOGLE,

Proctors for Appellee.

No. 3018

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COMPAGNIE MARITIME FRANCAISE
(a French corporation),

Appellant,

VS.

HERMANN L. E. MEYER, GEORGE H. C. MEYER,
HERMANN L. E. MEYER, JR., J. W. WILSON,
and JOHN M. QUAILE, partners under the
style of MEYER, WILSON & COMPANY,

Appellees.

REPLY BRIEF FOR APPELLANT.

LOUIS T. HENGSTLER,

GOLDEN W. BELL,

Attorneys for Appellant..

FILED

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F. O. MORGENTHAU,
CLERK

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No. 3018

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COMPAGNIE MARITIME FRANCAISE
(a French corporation),

Appellant,

vs.

HERMANN L. E. MEYER, GEORGE H. C. MEYER,
HERMANN L. E. MEYER, JR., J. W. WILSON,
and JOHN M. QUAILE, partners under the
style of MEYER, WILSON & COMPANY,

Appellees.

REPLY BRIEF FOR APPELLANT.

I. ANSWER TO ARGUMENT ON PAGES 5-20

OF APPELLEES' BRIEF.

To support the contention that the facts of this case "raised the presumption of her unseaworthiness on sailing", appellees cite the following cases:

- (1) *Work v. Leathers*, 97 U. S. 379;
- (2) *The Warren Adams*, 74 Fed. 413;
- (3) *The Aggie*, 93 Fed. 484;
- (4) *Pacific Coast SS. Co. v. Bancroft, Whitney Co.*, 94 Fed. 180;

- (5) *The Arctic Bird*, 109 Fed. 167;
 - (6) *Oregon Lumber Co. v. P. & A. SS. Co.*, 162 Fed. 913;
 - (7) *SS. Wellesley Co. v. C. A. Hooper & Co.*, 185 Fed. 735;
 - (8) *Carolina Portland Cement Co. v. Anderson*, 186 Fed. 145;
 - (9) *The River Meander*, 209 Fed. 931;
 - (10) *Benner Line v. Pendleton*, 210 Fed. 671.
- (*Brief for Appellees*, pp. 14-20.)

None of these cases support appellees' contention. No presumption of law such as is claimed exists in the law. The only legal presumption applying, in the absence of proof to the contrary, is that a vessel is seaworthy when she leaves her port of departure. In case, however, the fact appears that she begins to leak soon after leaving port without an adequate cause explaining this fact, the inference may be warranted that she was not seaworthy when she set sail. This, however, is never a presumption of law—such as is the presumption of seaworthiness on departure—but is merely an inference by which the Court is warranted to find logically a supposititious prior fact from a proved subsequent fact. Obviously such an inference is not warranted in the presence of actual proof that she was inspected, and made and found seaworthy as a matter of fact.

We proceed to show that the cases cited have no bearing on the instant case.

- (1) In *Work v. Leathers*, the shaft of the steamer's engine, which was shown to be too small

for the strain upon it, broke; the cylinder head of engine blew out when the chartered boat was in smooth, deep water, carrying only 100 pounds of steam. There was proof that she was old and approaching the end of her life as a ship, and that she suddenly failed in a vital part without any apparent cause. It was also shown by the fracture of the shaft that the crack in the shaft had existed some time.

On these facts the lower court held that the *presumption of seaworthiness was rebutted* (Fed. Cas. No. 17,415).

Consequently this is not a case of *presumption* of unseaworthiness on sailing, but a case where the proof shows that the vessel was in fact unseaworthy on sailing; in other words, a case where the initial *presumption of seaworthiness* is overthrown by the facts.

(2) The citation from *The Warren Adams* is clearly dictum. The Court said:

“In the present case the question of the burden of proof is an academic rather than a practical one. The vessel had been tried by violent seas for 36 hours before she sprang a leak. It is not surprising that the oakum should have worked out of some of the seams in the violent straining to which the trunk must have been subjected.”

This is therefore a case where the *initial presumption of seaworthiness* was supported by the facts.

- (3) In the case of *The Aggie* the District Judge simply repeated the dictum of the *Ada Warren* case, in an academic enumeration of rules relative to seaworthiness, but without application to the facts then before the Court.
- (4) In the case of the *Queen of the Pacific*, decided by this Court, the presumption of initial seaworthiness is recognized. In that case the vessel had sprung a leak *within 12 hours* after leaving the port of San Francisco, having encountered nothing unusual on the voyage. Of course such facts overthrow the presumption of seaworthiness; but the case has obviously no bearing on the case at bar, where the steamer was thoroughly inspected before leaving port, but after ten days, during part of which she encountered stormy weather, developed a leak.
- (5) In *The Arctic Bird* the barge sank with her cargo *six hours* after starting in tow, having proceeded through an ordinary sea. Under such circumstances Judge DeHaven's "*conclusion from the evidence*" (109 Fed. 170) that she was unseaworthy, was clearly warranted.

The evidence in the case at bar is very different; for here it appears that the vessel was inspected with the greatest care; that seven days after leaving Rotterdam she met with

a moderate gale with cross seas, and that two days thereafter a leak appeared caused by the loosening of a rivet in the steamer's bottom. Such evidence warrants a different conclusion from that drawn in the case of *The Arctic Bird*; it certainly would not warrant "a presumption of unseaworthiness on sailing".

- (6) In the *Oregon Lumber Co's* case the facts were that an old barge, which had been twice extensively overhauled and repaired—the last time five years before the accident—which had not been surveyed by any one having skill, and the interior timbers of which were shown to have been broken, sank with a cargo of coal. Even while being loaded she filled with water and could be kept barely afloat only by pumping; the bargemaster "was able to pump out in 10 hours what would run in in 24" (162 Fed. 917). The water gaining rapidly while she was discharging her coal into a steamer, she finally capsized and sank.

These facts show that she was unseaworthy from the beginning. Judge Wolverton's question (italicized by counsel for appellees): "How else could her condition be accounted for?" was very apropos in the case of this barge, but it would be difficult to extend it argumentatively to the very different facts of the case at bar.

- (7) In the case of the *Steamship Wellesley Co.* the accident occurred in the port of Eureka, while the vessel was being towed out of port, and before she had reached the bar. The "strong presumption of unseaworthiness", clearly warranted by such facts, has certainly no bearing upon the instant case.
- (8) In the *Carolina Portland Cement Co.* the presumption of unseaworthiness was predicated upon the following facts: (1) the schooner sprang a leak *within a few hours* after leaving port; (2) no perils of the sea had been encountered; (3) her steam pumps broke down when put in use. The presumption referred to could not be extended from such facts to the facts in the instant case, where (1) the leak was not apparent until ten days after sailing; (2) perils of the sea had been previously encountered; (3) the steamer had entered the port of Brest, floating obstructions being not unusual in ports; (4) the leak occurred through the loosening of a rivet; (5) the pumps were and remained in good condition during two months of strenuous use.
- (9) Referring to the words quoted from *The River Meander*, it is sufficient to remember that, in the case at bar, the shipowner used unusual means to know that his ship was sea-

worthy before the voyage began, and that he has proved it by the European depositions. It also appears that the impact with a floating obstruction while the vessel was being towed to Brest, or while she entered or left Brest, would be a more reasonable and probable explanation of the loosening of the rivet than the assumption that the vessel, in spite of the careful inspection, was unseaworthy at her departure from Rotterdam. Had she then been unseaworthy, the leak would have made its appearance during the three days' voyage to Brest, or at any rate before the lapse of ten days.

- (10) In the case of *Benner Line v. Pendleton*, a schooner, within three days after leaving port, suddenly sprang so serious a leak that she was in danger of sinking, and after a few days did sink with her cargo. While the language used by the Court and cited by counsel is warranted when applied to such facts, it has no application to the fundamentally different state of facts in the instant case.

A cursory examination of all the cases cited shows that, granting that the principles referred to properly govern the facts of each of these cases, they have not even a remote bearing upon the case at bar.

II. ANSWER TO ARGUMENT ON PAGES 21-33
OF APPELLEES' BRIEF.

Appellees state that:

"On November 22nd, the 'Duc d'Aumale' then being in 49° 37' south latitude and 66° 21' longitude, the weather and sea increased, *as was to be expected*, necessarily subjecting the vessel to greater strains than those experienced either in the moderate weather of September or in the fair weather subsequent thereto. *The result was that the leakage immediately increased* to such proportion that the master, after consultation with the crew, decided to run for the Falkland Islands."

(Brief, p. 21.)

"While the weather met on and after November 22nd was much more severe than the moderate weather of September, *it was the kind of weather to be reasonably expected in the lower latitudes in the vicinity of Cape Horn at that season of the year. The opinions of the shipmasters were in unanimous accord on that point.*" (Italics ours.)

(Brief, p. 25.)

"It was a pure case of leakage developing under the stress and strains of weather which the 'Duc d'Aumale' was *almost certain to meet on the voyage around the Horn.*"

(Brief, pp. 31-32.)

From these statements of counsel it follows that the master of the "Duc d'Aumale" knew, after his vessel began to leak in September that, if he should persist in continuing his voyage around the Horn, he "was almost certain to meet on the voyage around the Horn" precisely the fate which his

vessel did meet in fact. He could have avoided this fate on innumerable occasions before it overtook him by resorting to a port for repairs; but instead of this he wilfully determined, day after day for two months, to defy the fate which was reasonably to be expected. Does it not follow from this conclusively that the efficient cause of the damage to appellees' cargo was the master's act in so navigating his vessel, and that, if the danger and loss was to be reasonably expected in the unanimous opinion of shipmasters, the cause of this damage was not only error, but positive fault in the navigation of the vessel? Appellees draw a different conclusion from their statement of facts, viz.: that "the influx of water was due to unseaworthiness", but their conclusion leaves out of account the cardinal fact that the acts of the master constituted an intermediate cause, disconnected from any assumed primary fault of the owner, which cause, self-operating, produced the injury. The causal connection between the assumed original negligence of the owner and the damage to the cargo was broken by the interposition of an independent responsible human action. The damage resulted legally from the faults in the navigation or management of the vessel, and not from the assumed unseaworthiness at starting on the voyage. As Holmes, J., expressed the principle:

"The general tendency has been to look no further back than the last wrongdoer, especially

when he has complete and intelligent control of the consequence of the earlier wrongful act.”

Clifford v. Cotton Mills, 146 Mass. 47, 49.

III. ANSWER TO ARGUMENT ON PAGES 34-37

OF APPELLEES' BRIEF.

A. Hull.—From the condition of the vessel as it was found to be on drydocking at Buenos Ayres, appellees draw deductions as to her condition when she left Rotterdam. This seems hardly fair when it is remembered that she had been lying, in the interval, on the beach at Roy Cove for nearly three months. Considering that, during this period, she had been buffeted there by winds and waves of a notoriously severe character, her subsequent condition at Buenos Ayres testifies to one fact only, that she must have been originally a vessel of quite remarkable staunchness.

B. Stowage.—The stowage was made in a port which, for the stowage of this particular cargo, had a practical monopoly; it was made in the customary way and according to the best judgment of stevedores of exceptional experience in that particular line. No better ~~ex~~ ^a priori test exists. The master based his opinion that the cargo was well stowed upon “the way in which the ship behaved at sea” (Apostles, p. 186). No better ex post facto test exists. Counsel claims that the stowage was “condemned” by the surveyors in Buenos Ayres. The record discloses no evidence for such an assertion.

The master testified that "the change was advised by the surveyors. Myself, I did not see any objection to it, all the more because *it was an economy of time*" (Apostles, p. 187). In other respects the master considered the change in the method of stowage unnecessary, and gave it as his opinion, supported by reasons based upon his knowledge of the ship, that the original method was the better one. (p. 189) It is certain that the judgment of the stevedores and surveyors at Rotterdam, who had unusual experience with such cargoes and exclusive knowledge of the character of the ship, is more valuable on a practical question like stowage than the opinions of chance surveyors at Buenos Ayres, whose qualifications are not in evidence, and of post mortem experts at San Francisco who were called upon by appellees to make an imaginary loading of an unknown ship by mathematical formulae.

IV. ANSWER TO ARGUMENT ON PAGES 37-40 OF APPELLEES' BRIEF.

This argument simply disregards the principal issue of this case. No one denies the existence of an implied warranty of seaworthiness. Conceding, for the purposes of this case, the strict rule of the cases cited, that the carrier is bound to respond for any loss of, or direct damage to, goods in consequence of a breach of the implied warranty of seaworthiness, *it does not follow* that he is subject to the same

measure of liability for damages caused by an independent human agency, such as the faults of the master in navigating the ship. In all the cases cited by appellees the cargo suffered loss or direct damage by reason of the unseaworthiness of the ship at the commencement of the voyage. A clear distinction, however, exists between the loss of or direct damage to goods on account of unseaworthiness, and the consequences of a subsequent independent human act. In the case of *The Carib Prince* cargo was damaged by water flowing from the peak tank through a rivet hole into the cargo hold. In the case at bar the cargo would never have been damaged but for the active fault of the master in the navigation and management of the ship. The courts have recognized the distinction between loss caused by unseaworthiness, and loss suffered subsequently to unseaworthiness at the commencement, but not caused by such unseaworthiness. Thus, in the case of *Kopitoff v. Wilson*, cited with approval in *The Caledonia*, 157 U. S. 124, 131-132, Blackburn, J., left the following questions to the jury: "Was the vessel at the time of her sailing in a state, as regards the stowing and receiving of these plates, reasonably fit to encounter the ordinary perils that might be expected on a voyage at that season * * *? Second. *If she was not in a fit state, was the loss that happened caused by that unfitness?*"

Our contention is this: We concede that, where the loss is *caused by unseaworthiness*, the owner of the ship, although he has used due diligence, is

liable, unless he has expressly reduced his liability by contract. But in the case at bar the facts show clearly that the loss claimed *was not caused by unseaworthiness* (assuming, for the sake of this argument only, such to have existed), but that the loss was the direct and legal consequence of a human act, or series of human acts, constituting fault in the navigation and management of the ship of an aggravated kind. Under the general law the shipowner would not be held liable for such damage, although his ship failed to comply with the absolute warranty of seaworthiness; for no man is liable except for damage caused by *his* act. In addition to this, the Harter Act protects this shipowner, who certainly exercised due diligence to make his vessel in all respects seaworthy, by expressly providing that “neither his vessel, her owner or owners, agents or charterers, shall become or be held responsible for damage or loss *resulting from* faults or errors in navigation or in the management of said vessel.”

V. ANSWER TO ARGUMENT ON PAGES 41-44 OF
APPELLEES' BRIEF. (SEAWORTHINESS).

This subject is thoroughly covered by our opening brief, and nothing of value can now be added to it. Appellees, while contending for the actual unseaworthiness of the “Duc d’Aumale” at her sailing from Rotterdam, admit that *they may have exercised due diligence to make her seaworthy*” (Brief, p. 42).

VI. ANSWER TO ARGUMENT ON PAGES 44-48
OF APPELLEES' BRIEF.

Appellees *grant* "that due diligence was exercised to make the 'Duc d'Aumale' seaworthy", but contend that, notwithstanding this fact, appellant "cannot invoke the immunity against negligence in management or navigation of the vessel afforded by the third section of the Harter Act".

The reason, and the only reason, given for this contention is that "the efficient cause of the damage to the cargo was not negligence in management or navigation of the 'Duc d'Aumale', but her unseaworthiness". If this reason is invalid, appellees' contention must fall with it, and it then follows that appellant's contentions are correct.

Now it is almost mathematically demonstrable from appellees' own statements that the reason above given is not valid, and that any alleged unseaworthiness of the ship (denied by appellant and disproved by the evidence) is *not* the efficient cause of the damage to the cargo.

Appellees state that "the fact remains that it was the increase in leakage in the unseaworthy hull of the 'Duc d'Aumale' caused by the strains of the heavy seas encountered off the Falkland Islands, threatening her safety, which operated as the efficient cause of the * * * subsequent damage to the cargo" (Brief p. 45). Assuming this to be correct, and adding to it appellees' admission that severe weather was "to be reasonably expected in the lower latitudes in the vicinity of Cape Horn at that

season of the year" (Brief, pp. 25, 30), is it not a logical consequence of these two statements that the future "increase in leakage" near Cape Horn "was to be reasonably expected" by the master two months before, and was the natural sequence of his persistence on the course which would naturally lead to the increase in leakage, and therefore naturally create the very condition which appellees admit to be "the efficient cause of the subsequent damage to the cargo"? Appellees admit that "the youthful master did not return to port for repairs when he discovered his ship making water" (Brief, p. 45), and thereby impliedly admit that he could have gone into a port for repairs (p. 45).

The failure to put in for repairs, and his actions after September 29th, in determining the question, how to get his ship crew and cargo to a place of safety, was primarily and essentially a question of navigation, as shown by the authorities cited in our opening brief. Our contention relative to the bearing which the case of *Corsar v. J. D. Spreckels & Bros. Co.*, 141 Fed. 260, has upon the instant case remains unshaken, and is confirmed by the comment made upon this case by appellees on pages 45 and 46 of their brief.

Appellant has no quarrel with the views which this Court took of the situation in *Pacific Coast SS. Co. v. Bancroft-Whitney Co.*, 94 Fed. 180. In that case the *Queen*, within twelve hours after leaving the port of San Francisco, sprang an uncontrollable leak and was deliberately run to the beach

at Port Hartford to save ship, crew and cargo. Of course the legal cause of the damage to the cargo was the leak in the steamer. The act of the master was analogous to the act of the third party who instinctively threw the squib which caused the damage, and whose act, though intervening between defendant's act and plaintiff, is not considered the proximate cause of the damage. This is to be distinguished from the case of the voluntary act of a responsible person which is not the natural consequence of an original condition, but is, as in the case at bar, an unnatural decision defying injurious consequences which are to be expected. Here the master's act was not merely "a link in the chain of causes of injury", but was the proximate cause which produced the damaging effect.

**VII. ANSWER TO ARGUMENT ON PAGES 48-49
OF APPELLEES' BRIEF.**

The novel point is made that there is no evidence as to the *manning, equipping or supplying* of the "Duc d'Aumale" and that, for that reason, the protection of the Harter Act cannot be invoked. The conclusive answer is, that none of these items are in issue under the pleadings in this case, and that, consequently, the proper manning, equipping and supplying is either admitted or presumed by law.

The libel alleges that the barque was "tight, staunch and strong, and every way fitted for the

agreed voyage'' (Ap. p. 13). The answer denies this and ''in this behalf said defendants aver that * * * at the time of said barque sailing from Rotterdam, her *hull* was in an unseaworthy condition and the said cargo on board said barque was *improperly stowed*'' (Ap. p. 35). Again it is alleged in the answer ''that the damage and injury aforesaid to the said cargo was * * * caused * * * *solely* by the negligence of the owners and master of the said ship in this, that the said ship at the time of sailing from said Rotterdam was in an unseaworthy condition as to the hull thereof, and was improperly stowed'' (Ap. p. 36). Evidence as to the manning, equipping or supplying of the 'Duc d'Aumale' was unnecessary, their sufficiency being admitted and no issue relative to these matters being presented by the pleadings.

VIII. ALL THE DAMAGE TO THE CARGO WAS CAUSED BY THE CAPTAIN'S FAULT IN NAVIGATION.

The answer of appellees admits this fact, and we mention it because the question might naturally occur, whether any of the damage was caused by the original leak. In this respect the answer avers ''that the submersion thereof, as well in the ship *while seeking a port of refuge as thereafter while she was stranded*, saturated the said cargo with salt water and further injured the same'' (Ap. p. 37). The previous injury referred to was injury involved in discharging the cargo at Buenos Ayres, after the

barque had left the Falkland Islands. In describing the *coke* damage the answer alleges "that by reason of the submersion of the coke in the hold of the said vessel *during the voyage entered upon to said port of refuge and during several weeks while she lay on the beach at Falkland Islands*, the said coke was saturated with salt water etc." The voyage to said port of refuge occurred between November 22 and November 25, 1907, and she lay on the beach for nearly three months thereafter. It is therefore admitted that the coke was not damaged until nearly two months after the first leak on September 29, when the period of the master's faults in navigation commenced, and that the entire damage to the coke occurred after the voyage to Port Stanley was entered upon, and after November 22, 1907.

This is also confirmed by the allegations of appellees' libel, wherein it is stated that the discharge of the cargo was required at Buenos Ayres, "which discharge involved great damage thereto and that the submersion thereof, as well in the ship *while seeking a port of refuge, as thereafter while she was stranded*, saturated the said cargo with salt-water and further injured the same" (Ap. p. 18). All the damage to the cargo admittedly occurred after November 22, 1907.

IX. CONCLUSION.

The following appear clearly as the salient features of this case:

First. On September 19, 1907, the ship with her cargo sailed from Rotterdam.

Second. On September 29th, after some rough weather, a leak was discovered, and regular daily pumping began.

Third. For nearly two months the master, instead of going to a port for repairs, continued with his leaking ship, past many ports where he could have found safety, on a voyage into dangerous seas where every navigator expects to encounter conditions apt to test the endurance of the staunchest ships.

Fourth. On November 22, 1907, with the expected increase of weather and sea, the leakage immediately increased to uncontrollable proportions, as was to be expected, and the sinking ship was run on the beach.

Fifth. From November 25, 1907, to February 13, 1908 (nearly three months), the ship lay on the beach, buffeted by the winds and waves, her cargo being submerged.

The bare statement of these facts suggests at once the legal cause of the stranding of the ship and the damage to her cargo. Both ship and cargo would have been safe, had they been taken into port; the danger to each, and subsequent damage, was caused by the wilful act or acts of the master in taking ship and cargo, with knowledge of the ship's precarious condition, into waters where her troubles could be normally expected.

We respectfully submit that the decrees of the District Court should be reversed, and a final decree ordered in favor of appellant for freight, with interest and costs.

Dated, San Francisco,
December 24, 1917.

LOUIS T. HENGSTLER,

GOLDEN W. BELL,

Attorneys for Appellant.

United States
7
Circuit Court of Appeals
For the Ninth Circuit.

LOGAN BILLINGSLEY and FRED BILL-
INGSLEY,
Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Western District of Washington, Northern Division.

Filed

AUG 16 1917

F. D. Monckton,
Clerk.

United States
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*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 3492.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY and FRED BILLINGS-
LEY,

Defendants.

Names and Addresses of Counsel.

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ants and Plaintiffs in Error,

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*Page-number appearing at foot of page of original certified Transcript
of Record.

*United States District Court, Western District of
Washington, Northern Division.*

November Term, 1916.

No. 3492.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LOGAN BILLINGSLEY, *alias* FRED ADAMS,
alias JOE BUSH, FRED BILLINGSLEY,
WILLIAM H. PIELOW and WILLIAM
FRAZIER,

Defendants.

Indictment.

The United States of America,
Western District of Washington,
Northern Division,—ss.

The grand jurors of the United States of America, duly selected, impaneled, sworn, and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present:

That heretofore, to wit, on the first day of March, A. D. one thousand nine hundred and sixteen, and thereafter during the life of the conspiracy herein alleged, the Pielow Special Delivery and Transfer Co., was a corporation with its principal place of business at Seattle, in King County, in the State of Washington, and William H. Pielow was the President and Manager thereof.

That during all the times herein mentioned said Pielow Special Delivery and Transfer Co. was a common carrier engaged in business as such at said Seattle, and among other things handled, carried, and transferred interstate shipments of freight and merchandise in [2] connection with divers and sundry railway lines and steamship companies doing an interstate common carrier business at Seattle aforesaid in freight and other items of merchandise.

And the said William H. Pielow was then and there during said times an officer, agent and employee of a common carrier.

That heretofore, to wit, on the first day of March, A. D. one thousand nine hundred and sixteen, and thereafter, during the life of the conspiracy hereinafter alleged, the Lloyd Transfer Company was a common carrier engaged in business as such at said Seattle, and among other things handled, carried and transferred interstate shipments of freight and merchandise at said Seattle in connection with divers and sundry railway and steamship lines and companies doing an interstate common carrier business in freight and other items of merchandise. That at divers and sundry times during the existence of the conspiracy hereinafter set forth and alleged, said William Frazier was employed by the said Lloyd Transfer Company as a driver, the particular times being to the grand jurors unknown except as hereinafter more specifically alleged, and so the grand jurors say that said William Frazier was then

and there an employee and agent of a common carrier.

That at divers and sundry times during the existence of the conspiracy herein alleged, a more particular designation of said time not being within the knowledge of the grand jurors except as hereinafter more particularly stated, the said William Frazier and the said [3] Logan Billingsley, *alias* Fred Adams, *alias* Joe Bush, engaged in business as a common carrier at Seattle aforesaid under the name and style of Frazier Transfer Company, a more particular designation thereof, together with the respective interest of each of said conspirators, to wit, William Frazier and Logan Billingsley, *alias* Fred Adams, *alias* Joe Bush, therein, not being within the knowledge of the grand jurors aforesaid, and as such carrier hauled, trucked and transferred interstate shipments of merchandise, the times and particulars thereof being to the grand jurors unknown except as hereinafter more particularly alleged.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That heretofore, to wit, on the first day of March, A. D. one thousand nine hundred and sixteen, at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, Logan Billingsley, *alias* Fred Adams, *alias* Joe Bush, Fred Billingsley, William Frazier and William H. Pielow, late of said Seattle, did then and there conspire, combine, confederate and agree together and one with another and together and with Edward

P. Baker and Harry C. Hunt, late of San Francisco, California, acting upon their own behalf and as manager and president respectively of the Jesse Moore Hunt Co., a corporation, and together and there divers and sundry other persons to the grand jurors unknown, to commit an offense against the United States, that is to say, to [4] violate Section 238 of the Act of Congress of March 4, 1909, Chapter 321, otherwise known as the Penal Code of the United States, in this, and that it was the purpose, plan and object of the said conspiracy and of the said conspirators, and each of them, that an officer, agent and employee of a common carrier should knowingly deliver and cause to be delivered to a person other than the person to whom spirituous, malt and intoxicating liquors had been consigned, without then and there having a written order of delivery from the true and *bona fide* consignee, the said intoxicating liquor having theretofore been shipped and carried from the State of California, to the state of Washington, and then and there and theretofore consigned to divers persons in Washington and Alaska.

And it was further the purpose and object of the said conspiracy that an officer, agent and employee of a common carrier should knowingly deliver and cause to be delivered, malt, spirituous and intoxicating liquors to divers and sundry fictitious persons in said Washington and Alaska, which had theretofore been shipped and carried from California to Washington, that it to say, that it was the plan and object of the said conspiracy and of said

conspirators, and each of them, that the defendants Frazier and Pielow, as officers, agents and employees of common carriers, as hereinbefore alleged, and while acting in their said capacity, should wilfully, knowingly and feloniously and unlawfully deliver and cause spirituous malt and intoxicating liquors to be delivered to persons other than the true consignee without then and there having [5] a written order of delivery from the *bona fide* consignee, and to deliver spirituous and intoxicating liquors to divers and sundry fictitious persons, and to divers and sundry persons under fictitious names, at said Seattle, which said liquor had theretofore been shipped from California to Washington by the said Jesse Moore Hunt Company, and the said Edward P. Baker and Harry C. Hunt, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths aforesaid do further present: That after the formation of the said unlawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said William H. Pielow, at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, did on the eleventh day of July, A. D. one thousand nine hundred and sixteen, wilfully, knowingly, feloniously and unlawfully receive and take into his possession and custody and into the possession and custody of the Pielow Special Delivery and Transfer Co., of which he was then and there an

officer, agent and employee, a certain quantity of spirituous and intoxicating liquors, to wit, one barrel of whiskey and one cask of whiskey from the Oregon-Washington Railroad & Navigation Co., a railroad corporation, which said whiskey was then and there consigned to the Raymer Pharmacy.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That after the formation of the said unlawful conspiracy, the said William Frazier [6] at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, did on the eleventh day of July, A. D., one thousand nine hundred and sixteen, wilfully, knowingly, feloniously and unlawfully receive and take into his custody and possession a certain shipment of spirituous and intoxicating liquors, to wit, one barrel of whiskey and one cask of whiskey from the Oregon-Washington Railroad & Navigation Co., a railroad corporation, then and there consigned to the Raymer Pharmacy.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That after the formation of said unlawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said William Frazier at Seattle, in the Northern Division of the Western District of Washington and within the jurisdiction of this court, on the twenty-eighth day of June, A. D., one thousand nine hundred and sixteen, did then and there wilfully, knowingly, unlawfully and feloni-

ously take and receive into his possession and custody two barrels of spirituous and intoxicating liquor, to wit, whiskey from the Oregon-Washington Railroad & Navigation Co., a railway corporation, which said whiskey was then and there consigned to a fictitious consignee, to wit, the Ket Pharmacy, said two barrels of whiskey having theretofore been shipped and transported from the state of California to Seattle in the State of Washington. [7]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That after the formation of said unlawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said William Frazier, at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, did on the twentieth day of May, A. D. one thousand nine hundred and sixteen, wilfully, knowingly, feloniously and unlawfully receive and take into his possession and custody, he being then and there an agent and employee of the said Lloyd Transfer Company, a certain quantity of spirituous and intoxicating liquors, to wit, two barrels of whiskey from Wells Fargo & Co., a common carrier.

And the grand jurors aforesaid upon their oaths aforesaid, do further present: That after the formation of said unlawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said William Frazier, at Seattle, in the Northern Division of the

Western District of Washington, and within the jurisdiction of this court, did on the sixteenth day of June, A. D. one thousand nine hundred and sixteen, wilfully, knowingly, feloniously and unlawfully receive and take into his possession [8] and custody and into the possession and custody of the Lloyd Transfer Company, of which he was then and there an agent and employee, a certain quantity of spirituous and intoxicating liquors, to wit, three barrels of whiskey from Wells Fargo & Co., a common carrier, which said whiskey was then and there consigned to a fictitious consignee, to wit, the Arket Pharmacy, the same having been shipped from the State of California to Seattle in the State of Washington.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That after the formation of said unlawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said William H. Pielow, at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, did on the seventeenth day of [9] June, A. D. one thousand nine hundred and sixteen, wilfully, knowingly, feloniously and unlawfully receive and take into his possession and custody and into the possession and custody of the Pielow Special Delivery and Transfer Co., of which he was then an officer, agent, and employee, a certain quantity of spirituous and intoxicating liquors, to wit, three barrels of whiskey from Wells Fargo & Co., a common carrier, which said whiskey was then and there

consigned to a fictitious consignee, to wit, the Arket Pharmacy, and theretofore had been shipped from the state of California to Seattle in the state of Washington.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That after the formation of said unlawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said William H. Pielow, at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, did on the seventeenth day of June, A. D. one thousand nine hundred and sixteen, wilfully, knowingly, feloniously and unlawfully receive and take into his possession and custody and into the possession and custody of the Pielow Special Delivery and Transfer Co., of which he was then an officer, agent, and employee, a certain quantity of spirituous and intoxicating liquors, to wit, three barrels of whiskey from Wells Fargo & Co., a common carrier.

[10]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That after the formation of said unlawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said Logan Billingsley, with *alias* aforesaid, on the twelfth day of June, A. D. one thousand nine hundred and sixteen, at Seattle, in the Northern Division of the Western District of Washington and within the jurisdiction of this court, did then and there wilfully, knowingly, feloniously and unlawfully send and cause to be sent a certain telegraphic

message over the lines and telegraph wires of the Western Union Telegraph Company to the Jesse Moore Hunt Company of San Francisco, California, which message was of the following tenor and effect, to wit:

“WESTERN UNION TELEGRAM.

“Jessie Moore Hunt Co.,
San Francisco.

Ship two barrels Bedford bulk and one barrel bottled by Express tomorrow. Repeat same order Thursday Express. Also ship by rail freight one barrel Bedford bulk every day.

FRED ADAMS.”

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That after the formation of said unlawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said Logan Billingsley, with *alias* aforesaid, on the thirty-first day of August, A. D. one thousand nine hundred and sixteen, at Seattle, in the Northern Division [11] of the Western District of Washington and within the jurisdiction of this court, did then and there wilfully, knowingly, feloniously and unlawfully send and cause to be sent a certain telegraphic message over the lines and telegraph wires of the Western Union Telegraph Company to the Jesse Moore Hunt Company of San Francisco, California, which message was of the following tenor and effect, to wit:

“WESTERN UNION TELEGRAM.

“Jessie Moore Hunt Co.,

San Fran, Cal.

Everything O. K. send following message quickly Pilow Transfer Company Seattle car to John Amber, Alaska, care Lloyd Transfer. Should have gone your care forward same promptly Jessie Moore Hunt.

JOE BUSH.”

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That after the formation of said lawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said Logan Billingsley, with *alias* aforesaid, on the twenty-seventh day of June, A. D. one thousand nine hundred and sixteen, at Seattle, in the Northern Division of the Western District of Washington and within the jurisdiction of this court, did then and there wilfully, knowingly, feloniously and unlawfully send and cause to be sent a certain telegraphic message over the lines and telegraph wires of the Western Union Telegraph Company to the Jesse Moore Hunt Company of San Francisco, California, which message was of the following tenor [12] and effect, to wit:

“WESTERN UNION TELEGRAM.

“Mr. Ed Baker,

Jessie Moore Hunt Co.,

San Francisco, Calif.

Cant you change dates and express six at once everything O K for me here now period Start ship-

ping by rail freight at once as follows, two barrels bulk and two barrels bottles every day to Peat Carlson at Juneau, Alaska to be shipped in care of Frazier Transfer at Seattle. Mail bills ladings to me.

FRED ADAMS."

—contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

CLAY ALLEN,

United States Attorney.

WINTER S. MARTIN,

Assistant United States Attorney.

[Endorsed]: Indictment for Vio. Sec. 37, P. C., to vio. Sec. 238. A True Bill. Henry S. Volkmar, Foreman Grand Jury. Presented to the Court by the Foreman of the Grand Jury in Open Court in the Presence of the Grand Jury and Filed in the U. S. District Court, Dec. 21, 1916. Frank L. Crosby, Clerk. [13]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3,492.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY, FRED BILLINGSLEY
and WM. H. PIELOW, etc.,

Defendants.

Arraignments and Pleas.

Now on this 10th day of January, 1917, into open court come the defendants Logan Billingsley, Fred Billingsley and Wm. H. Pielow, for arraignment, and each answer their true names are as above, whereupon the reading of the indictment is waived and they each enter a plea of guilty to the charge in the indictment herein against them.

Journal 6, Page 40. [14]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3,492, No. 3,498, No. 3,499, No. 3,500, No. 3,551.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY et al.,

Defendants.

Motion to Withdraw Pleas of Guilty and Enter Pleas of Not Guilty.

Now, on this 19th day of April, defendants Logan Billingsley, Fred Billingsley and Ora Billingsley appear in court with counsel, Wm. R. Bell, and move to withdraw pleas of guilty heretofore entered, and enter pleas of not guilty, Clarence L. Reams and Clay Allen appearing for the plaintiff. The motion is argued by respective counsel and motion denied by the Court. Exception is granted.

The Government moves for judgment and sentence at this time.

Journal 6, page 147. [15]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3,492.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY et al.,

Defendants.

Sentence of Logan Billingsley.

Comes now on this 19th day of April, 1917, the said defendant Logan Billingsley into open court for sentence, and being informed by the Court of the indictment herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, he nothing says save as he before hath said.

WHEREFORE, by reason of the law and the premises, it is considered, ordered and adjudged by the Court that the defendant is guilty of the crime of violation Sec. 37, P. C., to violate sec. 238, and that he be punished by being imprisoned in the United States Penitentiary at McNeil Island, Pierce County, Washington, or in such other place as may be hereafter provided for the imprisonment of of-

fenders against the laws of the United States, for the term of thirteen months, to run concurrently with sentences in Nos. 3,500 and 3,551, at hard labor, from and after this date. And the said defendant is now hereby ordered into the custody of the United States Marshal to carry this sentence into execution.

Judgment and Decree Book No. 2, page 158. [16]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3,492.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY et al.,

Defendants.

Sentence of Fred Billingsley.

Comes now on this 19th day of April, 1917, the said defendant Fred Billingsley, into open court for sentence, and being informed by the Court of the indictment herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, he nothing says save as he before hath said.

WHEREFORE, by reason of the law and the premises, it is considered, ordered and adjudged by the Court that the defendant Fred Billingsley is guilty of violation sec. 37, P. C., to violate sec. 238,

and that he be punished by being imprisoned in the Whatcom County Jail at the County Farm, or in such other place as may be hereafter provided for the imprisonment of offenders against the laws of the United States, for the term of six months, to run concurrently with sentence in No. 3,551, from and after this date. And the said defendant is now hereby ordered into the custody of the United States Marshal to carry this sentence into execution.

Judgment and Decree Book No. 2, page 158. [17]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3,492.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY, FRED BILLINGSLEY
and ORA BILLINGSLEY,

Defendants.

Petition for Writ of Error—Logan Billingsley.

To the Hon. JEREMIAH NETERER, Judge of the
Above-entitled Court:

The above-named defendant, Logan Billingsley, respectfully petitions that a writ of error may be issued wherein and whereby the order and judgment of this Court made and entered herein on the 19th day of April, 1917, denying the motion of the said defendant to be permitted to withdraw his plea of

guilty to the indictment herein, and to substitute therefor a plea of not guilty, was denied and thereafter sentence was pronounced against the said defendant upon motion of the District Attorney for this district made upon said day, may be reviewed by the Circuit Court of Appeals of the United States for the Ninth Circuit, and also petition this Court that in the said order allowing said writ of error to issue it be further provided that the judgment and sentence above mentioned be superseded and stayed, and that the said defendant be admitted to bail pending the disposition of the said writ of error by the said Circuit Court of Appeals of the Ninth Circuit.

Respectfully submitted this, the 12th day of May, 1917.

WALTER B. ALLEN,
Attorney for Defendant.

[Endorsed]: Petition. Filed in the U. S. District Court, Western District of Washington, Northern Division. May 12, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [18]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3,492.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY, FRED BILLINGSLEY
and ORA BILLINGSLEY,

Defendants.

Petition for Writ of Error—Fred Billingsley.

To the Hon. JEREMIAH NETERER, Judge of the
Above-entitled Court:

The above-named defendant, Fred Billingsley, respectfully petitions that a writ of error may be issued wherein and whereby the order and judgment of this Court made and entered herein on the 19th day of April, 1917, denying the motion of the said defendant to be permitted to withdraw his plea of guilty to the indictment herein, and to substitute therefor a plea of not guilty, was denied and thereafter sentence was pronounced against the said defendant upon motion of the District Attorney for this district made upon said day, may be reviewed by the Circuit Court of Appeals of the United States for the Ninth Circuit, and also petition this Court that in the said order allowing said writ of error to issue it be further provided that the judgment and sentence above mentioned be superseded and stayed, and that the said defendant be admitted to bail pending the disposition of the said writ of error by the said Circuit Court of Appeals of the Ninth Circuit.

Respectfully submitted this, the 2d day of May, 1917.

WALTER B. ALLEN,
Attorney for Defendant.

[Endorsed]: Petition. Filed in the U. S. District Court, Western District of Washington, Northern Division. May 7, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [19]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3,492.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY and FRED BILLINGS-
LEY et al.,

Defendants.

Assignment of Errors—Logan Billingsley.

Comes now the above-named defendant, Logan Billingsley, and files the following assignment of errors upon which he will rely in the prosecution of the writ of error in the above-entitled cause;

I.

That the United States District Court for the Western District of Washington, Northern Division, erred in denying the defendant the right to withdraw his plea of guilty.

II.

That the United States District Court in and for the Western District of Washington, Northern Division, erred in refusing to permit the said defendant to withdraw his plea of guilty and to substitute a plea of not guilty.

III.

That the said Court erred in passing the sentence upon the said defendant.

IV.

That the said Court erred in holding that the indictment herein states facts sufficient to constitute an offense under the laws of the United States.

Wherefore the said defendant and plaintiff in error prays that the judgment of the said Court be reversed, and such directions be given that the alleged errors may be corrected and [20] law and justice done in the matter.

WALTER B. ALLEN,
Attorney for the Defendant and Plaintiff in Error.

[Endorsed]: Assignment of Error. Filed in the U. S. District Court, Western District of Washington, Northern Division. May 12, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [21]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3,492.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY and FRED BILLINGS-
LEY et al.,

Defendants.

Assignment of Errors—Fred Billingsley.

Comes now the above-named defendant, Fred Billingsley, and files the following assignment of errors upon which he will rely in the prosecution of the writ

of error in the above-entitled cause:

I.

That the United States District Court for the Western District of Washington, Northern Division, erred in denying the defendant the right to withdraw his plea of guilty.

II.

That the United States District Court in and for the Western District of Washington, Northern Division, erred in refusing to permit the said defendant to withdraw his plea of guilty and to substitute a plea of not guilty.

III.

That the said Court erred in passing the sentence upon the said defendant.

IV.

That the said Court erred in holding that the indictment herein states facts sufficient to constitute an offense under the laws of the United States.

Wherefore the said defendant and plaintiff in error prays that the judgment of the said Court be reversed, and such directions be given that the alleged errors may be corrected and [22] law and justice done in the matter.

WALTER B. ALLEN,

Attorney for the Defendant and Plaintiff in Error.

[Endorsed]: Assignment of Error. Filed in the U. S. District Court, Western District of Washington, Northern Division. May 7, 1917: Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [23]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3,492.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY, FRED BILLINGSLEY,
et al.,

Defendants.

Order for Writ of Error—Logan Billingsley.

This the 10th day of May, 1917, came the defend-
ant, Logan Billingsley, by his attorneys and filed
herein and presented to the Court his petition pray-
ing for the allowance of a writ of error intended to
be urged by him, praying also that a transcript of the
records and proceedings and papers upon which the
judgment herein was rendered, duly authenticated,
may be sent to the United States Court of Appeals
for the Ninth Circuit, and that such other and fur-
ther proceedings may be had as may be proper in the
premises.

On consideration whereof the Court does allow the
writ of error and the same shall act as a supersedeas
staying the execution of the sentence imposed herein
until the hearing by said Circuit Court of Appeals
thereof.

JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Order for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. May 12, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [24]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3,492.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY, FRED BILLINGSLEY
and ORA BILLINGSLEY,

Defendants.

Order for Writ of Error—Fred Billingsley.

This, the — day of —, 1917, came the defendant Fred Billingsley by his attorney and filed herein, and presented to the Court his petition praying for the allowance of a writ of error intended to be urged by him, praying also that a transcript of the records and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the Court does allow the writ of error and the same shall act as a supersedeas, staying the execution of the sentence imposed herein

until the determination of his appeal receipt of the remittitur by Circuit Court of Appeals.

And it is further ordered that the said defendant, Fred Billingsley, be released from custody pending the said appeals, upon his filing a good and sufficient bond approved by this Court, in the sum of \$2,500.

And it further appearing to the Court that the sentence of the said defendant, Fred Billingsley, ran concurrent with the similar sentence in cause No. 3,551, and a writ of error has issued upon behalf of the said defendant also in said cause, it is ordered that the said bond of \$2,500 shall be conditioned for his appearance in each of said cases and shall be filed by the clerk in each of said cases.

JEREMIAH NETERER,

Judge. [25]

[Endorsed]: Order for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. May 7, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [26]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3,492.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY and FRED BILLINGS-
LEY,

Defendants.

No. 3,500.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY and FRED BILLINGS-
LEY,

Defendants.

No. 3,551.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY and FRED BILLINGS-
LEY,

Defendants.

Bail Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, Logan Billingsley and Fred Billingsley, as principals, and Rollin Sanford and E. J. Whitty, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Seven Thousand (\$7,000) Dollars, payment whereof well and truly to be made we bind ourselves and each of us, our heirs, executors and assigns, jointly and severally firmly by these presents.

The condition of the above obligation is such that whereas, in the above-entitled causes in which the United States of America, is plaintiff, and Logan Billingsley and Fred Billingsley, are defendants, a writ of error has been issued to the Circuit Court of

Appeals for the Ninth Circuit, from the judgment entered in each of said causes and an order has been entered in each of said [27] causes fixing the amount of the bail bond for the release of the said Logan Billingsley and Fred Billingsley, upon bail pending the determination of said writs of error by said Appellate Court in the sum of Seven Thousand (\$7,000) Dollars, and the said order is further conditioned that the said bond shall be a joint and several bond and shall serve as a single bond for each of the above causes of action, but in no case shall the sureties hereon be liable in all of the three causes herein taken jointly, in excess of said Seven Thousand (\$7,000) Dollars.

Now, therefore, if the said Logan Billingsley and Fred Billingsley, as principal obligors, shall each and both appear and surrender himself, and themselves, in said above-entitled court, and from time to time thereafter as he or they or either of them may be required to answer any further proceedings, and they and each of them shall obey and perform any judgment or order which may be had or rendered therein in either of the said cases above mentioned, and they and each of them shall abide by and perform any judgment or order which may be rendered in the said United States Circuit Court of Appeals for the Ninth Circuit, and shall not depart from the said district without leave thereof, then this obligation shall be null and void; otherwise of full force and effect.

In witness whereof we have set our hands and

seals this, the 10th day of May, 1917.

LOGAN BILLINGSLEY,

FRED BILLINGSLEY.

ROLLIN SANFORD.

E. J. WHITTY.

O. K.—ALLEN, U. S. Atty.

JEREMIAH NETERER, Judge.

State of Washington,

County of King,—ss.

Rollin Sanford and E. J. Whitty, being first duly sworn, each for himself and not one for the other, on oath deposes and says: That he is a citizen of the United States [28] over the age of twenty-one years, and a resident of King County, Washington; that he is not an attorney, counselor at law, sheriff or other officer of any court; that he is worth in his own separate property within the State of Washington, over and above all his just debts and liabilities, exclusive of property from sale on execution, the sum of Seven Thousand Dollars.

ROLAND SANFORD.

E. J. WHITTY.

Subscribed and sworn to before me this 10th day of May, 1917.

[Seal]

R. W. GARDNER,

Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Bail Bond. Filed in the U. S. District Court, Western District of Washington, Northern Division. May 10, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [29]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 3,492.

LOGAN BILLINGSLEY et al.,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

**Order Extending Time to July 15, 1917, to File
Record—Logan Billingsley.**

This matter coming on for hearing upon petition of the plaintiff in error, Logan Billingsley, for an order extending the return time until July the 15th;

It is hereby ordered that the return day upon said Writ of Error be, and the same hereby is extended up to and including the 15th day of July, 1917.

Done in open court this 7th day of June, 1917.

JEREMIAH NETERER,

Judge.

[Endorsed]: Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. June 7, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [30]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 3,492.

LOGAN BILLINGSLEY et al.,
Plaintiffs in Error,
vs.

UNITED STATES OF AMERICA,
Defendant in Error.

**Order Extending Time to July 15, 1917, to File
Record—Fred Billingsley.**

This matter coming on for hearing upon petition of the plaintiff in error, Fred Billingsley, for an order extending the return time until July the 15th,

It is hereby ordered that the return day upon said Writ of Error be, and the same hereby is extended up to and including the 15th day of July, 1917.

Done in open court this 7th day of June, 1917.

JEREMIAH NETERER,
Judge.

[Endorsed]: Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. June 7, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [31]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3492.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY et al.,

Defendants.

**Order Extending Time to August 1, 1917, to File
Record.**

Upon motion of the defendants herein it appearing to the Court that good cause exists therefor:

It is hereby ordered that the return day in the above-numbered cause upon the Writ of Error be, and the same hereby is extended up to and including the 1st day of August, 1917.

JEREMIAH NETERER,

Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. July 12, 1917.
Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

[32]

*United States Circuit Court of Appeals for the
Ninth Circuit.*

No. 3492.

Writ of Error—Logan Billingsley (Copy).

United States of America,
Ninth Judicial District.

The President of the United States of America, to
the Honorable Judge of the District Court of
the United States for the Western District of
Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which was
made and entered in the said District Court before
you between the United States of America, as plain-
tiff, and Logan Billingsley, as defendant, being No.
3492 of the records of the said District Court in and
for the Western District of Washington, Northern
Division, it is concluded a manifest error it is alleged
hath happened to the great damage of the said Logan
Billingsley, as defendant, as by his complaint ap-
pears, we, being willing that error, if any hath been,
should be duly corrected and full and complete jus-
tice done to the parties aforesaid in this behalf, do
command you, if judgment be therein given, that
then under your seal, distinctly and openly, you send
the records and proceedings aforesaid, with all mat-
ters concerning the same, to the United States Cir-
cuit Court of Appeals for the Ninth Circuit, together
with this writ, so that you have the same at Seattle

in said Circuit within thirty days from the date hereof, the said Circuit Court of Appeals to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

[Seal]

JEREMIAH NETERER,
District Judge. [33]

[Endorsed]: Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. May 12, 1917. Frank L. Crosby Clerk. By Ed M. Lakin, Deputy. [34]

*United States Circuit Court of Appeals for the
Ninth Circuit.*

No. 3492.

Writ of Error—Fred Billingsley.

United States of America,
Ninth Judicial District.

The President of the United States of America, to
the Honorable Judge of the District Court of
the United States for the Western District of
Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which was
made and entered in the said District Court before
you, between the United States of America, as plain-
tiff, and Fred Billingsley, as defendant, being No.

3492 of the records of the said District Court in and for the Western District of Washington, Northern Division, a manifest error, it is alleged, hath happened to the great damage of the said Fred Billingsley as defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and complete justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all matters concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at Seattle in said Circuit within thirty days from the date hereof, the said Circuit Court of Appeals to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

[Seal]

JEREMIAH NETERER,

District Judge.

We hereby acknowledge receipt of a copy and service of the within Writ of Error this 7th day of May, 1917.

CLAY ALLEN,

Attorney for Defendant in Error. [35]

[Endorsed]: Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. May 7, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [36]

*In the Circuit Court of Appeals of the United States
for the Ninth Circuit.*

No. 3,492.

Citation—Logan Billingsley.

To the United States of America and to the Hon.

CLAY ALLEN, District Attorney for the Western District of Washington, Northern Division, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of Seattle, in said Circuit, on the First day of the September Term, 1917, next, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Logan Billingsley is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

[Seal]

JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. May 12, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [37]

*In the Circuit Court of Appeals of the United States
for the Ninth Circuit.*

No. 3,492.

Citation—Fred Billingsley.

To the United States of America and to the Hon.

CLAY ALLEN, District Attorney for the Western District of Washington, Northern Division, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of Seattle, in said Circuit, on the First day of the September Term, 1917, next, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Fred Billingsley is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

[Seal]

JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. May 7, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [38]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3,492.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY,

Defendant,

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare record on Writ of Error consisting of Indictment; Plea; Motion to Change Plea and Denial; Sentence; Petition for Writ of Error; Assignment of Errors; Order for Writ; Writ of Error; Citation; Bond; Order Extending Time of Return.

W. B. ALLEN.

Filed in the U. S. District Court, July 12, 1917.
Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

I waive the provisions of the Act approved February 13, 1911, and direct that you forward type-written transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this Court.

WM. R. BELL,

Attorney for Defendants. [39]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3,492.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY and FRED BILLINGS-
LEY,

Defendants.

Clerk's Certificate to Transcript of Record, etc.

United States of America,

Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify that the foregoing 39 pages numbered from 1 to 39, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as are necessary to the hearing of said cause on Writ of Error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to said Writ of Error herein from the judgment of said United States District Court for the Western District of Washington to the United

States Circuit Court of Appeals for the Ninth Circuit.

I, further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the Plaintiffs in Error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [40]

Clerk's fee (Sec. 828 R. S. U. S.) for making record, certificate or return, 66 folios at 15c	9.90
Certificate of Clerk to transcript of record, 4 folios at 15c60
Seal to said Certificate20
Total,	\$ 10.70

I hereby certify that the above cost for preparing and certifying record amounting to \$10.70 has been paid to me by Walter B. Allen, Esq., Attorney for Plaintiffs in Error.

I further certify that I hereto attach and herewith transmit the original Writ of Error and original Citation issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 25th day of July, 1917.

[Seal]

FRANK L. CROSBY,
Clerk U. S. District Court.

By Leeta D. Manning,
Deputy. [41]

*United States Circuit Court of Appeals for the
Ninth Circuit.*

3,492.

Writ of Error—Logan Billingsley (Original).

United States of America,
Ninth Judicial District.

The President of the United States of America, to
the Honorable Judge of the District Court of
the United States for the Western District of
Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which was
made and entered in the said District Court before
you, between the United States of America, as plain-
tiff, and Logan Billingsley, as defendant, being No.
3492 of the records of the said District Court in
and for the Western District of Washington, North-
ern Division, it is contended a manifest error it is
alleged hath happened to the great damage of the
said Logan Billingsley, as defendant, as by his com-
plaint appears, we, being willing that error, if any
hath been, should be duly corrected and full and
complete justice done to the parties aforesaid in this
behalf, do command you, if judgment be therein
given, that then under your seal, distinctly and
openly, you send the records and proceedings afore-
said, with all matters concerning the same, to the
United States Circuit Court of Appeals for the
Ninth Circuit, together with this writ, so that you
have the same at Seattle in said Circuit within

thirty days from the date hereof, the said Circuit Court of Appeals to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

[Seal]

JEREMIAH NETERER,

District Judge. [42]

[Endorsed]: Original. No. 3492. In the Superior Court of the State of Washington for the County of King. United States of America, Plaintiff, vs. Logan Billingsley et al., Defendants. Writ of Error. Filed in the U. S. District Court Western Dist. of Washington, Northern Division, May 12, 1917. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [43]

United States Circuit Court of Appeals for the Ninth Circuit.

3,492.

Writ of Error—Fred Billingsley (Original).

United States of America,

Ninth Judicial District.

The President of the United States of America, to
the Honorable Judge of the District Court of
the United States for the Western District of
Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which was

made and entered in the said District Court before you, between the United States of America, as plaintiff, and Fred Billingsley, as defendant, being No. 3,492 of the records of the said District Court in and for the Western District of Washington, Northern Division, a manifest error, it is alleged, hath happened to the great damage of the said Fred Billingsley as defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and complete justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all matters concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at Seattle in said Circuit within thirty days from the date hereof, the said Circuit Court of Appeals to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

[Seal]

JEREMIAH NETERER,
District Judge. [44]

[Endorsed]: Original. No. 3492. In the Superior Court of the State of Washington for the County of King. United States of America, Plaintiff, vs. Logan Billingsley et al., Defendants. Writ

of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, May 7, 1917. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

We hereby acknowledge receipt of a copy and service of the within Writ of Error this 7 day of May, 1917.

CLAY ALLEN,
Attorney for Dft. in Error. [45]

*The Circuit Court of Appeals of the United States,
for the Ninth Circuit.*

Citation—Logan Billingsley (Original).

To the United States of America and to the Hon.

CLAY ALLEN, District Attorney for the Western District of Washington, Northern Division,
GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of Seattle, in said Circuit, on the first day of the Sept. Term, 1917, next, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Logan Billingsley is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be

done to the parties in that behalf.

[Seal]

JEREMIAH NETERER,

United States District Judge. [46]

[Endorsed]: Original. No. 3492. In the Superior Court of the State of Washington for the County of King. United States of America, Plaintiff, vs. Logan Billingsley et al., Defendants. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. May 12, 1917. Frank L. Crosby, Clerk. By Ed. Lakin, Deputy. [47]

*The Circuit Court of Appeals of the United States
for the Ninth Circuit.*

3492.

Citation—Fred Billingsley (Original).

To the United States of America and to the Hon.

CLAY ALLEN, District Attorney for the
Western District of Washington, Northern
Division, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of Seattle, Washington, in said Circuit, on the 1st day of September, 1917, next, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Fred Billingsley is plaintiff in error, and you are the defendant in error, to show cause, if any there be,

why the judgment rendered against the plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

[Seal]

JEREMIAH NETERER,
United States District Judge. [48]

[Endorsed]: No. 3492. Original. In the Superior Court of the State of Washington, for the County of King. United States of America, Plaintiff, vs. Logan Billingsley et al., Defendants. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. May 7, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

We hereby acknowledge receipt of a copy and service of the within Citation this 7 day of May, 1917.

CLAY ALLEN,
Attorney for Dft. in Error. [49]

[Endorsed]: No. 3022. United States Circuit Court of Appeals for the Ninth Circuit. Logan Billingsley and Fred Billingsley, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division. Filed July 28, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*United States District Court, Western District of
Washington, Northern Division.*

No. 3492.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY et al.,

Defendants.

**Order Extending Return Day to and Including
August 1, 1917 (Original).**

Upon motion of the defendants herein it appearing to the Court that good cause exists therefor,—

IT IS HEREBY ORDERED that the return day in the above-numbered causes upon the writ of error be, and the same hereby is extended up to and including the first day of August, 1917.

JEREMIAH NETERER,

Judge.

[Endorsed]: No. 3492. United States District Court, Western District of Washington, Northern Division. United States of America, Plaintiff, vs. Logan Billingsley et al., Defendants. Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jul. 12, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 3492.

LOGAN BILLINGSLEY et al.,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error,

**Order Extending Return Day to and Including July
15, 1917—Fred Billingsley (Original).**

This matter coming on for hearing upon petition of the plaintiff in error, Fred Billingsley, for an order extending the return time until July the 15th,—

IT IS HEREBY ORDERED that the return day upon said Writ of Error be, and the same hereby is extended up to and including the 15th of July, 1917.

Done in open court this 7th day of June, 1917.

JEREMIAH NETERER,

Judge.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jun. 7, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 3492.

LOGAN BILLINGSLEY et al.,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

**Order Extending Return Day to and Including July
15, 1917—Logan Billingsley (Original).**

This matter coming on for hearing upon petition of the plaintiff in error, Logan Billingsley, for an order extending the return time until July the 15th,

IT IS HEREBY ORDERED that the return day upon said Writ of Error be, and the same hereby is extended up to and including the 15th of July, 1917.

Done in open court this 7th day of June, 1917.

JEREMIAH NETERER,

Judge.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jun. 7, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

No. 3022. United States Circuit Court of Appeals for the Ninth Circuit. Three Orders Under Rule 16 Enlarging Time to July 15, 1917, to File Record Thereof and to Docket Case. Filed Jul. 28, 1917. F. D. Monekton, Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

LOGAN BILLINGSLEY,

Plaintiff in Error,
vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.

Filed

AUG 16 1917

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

LOGAN BILLINGSLEY,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

**Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.**

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3500.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY and FRED BILLINGS-
LEY,

Defendants.

Names and Addresses of Counsel.

WALTER B. ALLEN, Esq., Attorney for Defend-
ants and Plaintiffs in Error,

521 Lyon Building, Seattle, Washington.

Messrs. BELL & HODGE, Attorneys for Defend-
ants and Plaintiffs in Error,

New York Block, Seattle, Washington.

CLAY ALLEN, Esq., U. S. Attorney, Attorney for
Plaintiff and Defendant in Error. [1*]

*Page-number appearing at foot of page of original certified Transcript
of Record.

*United States District Court, Western District of
Washington, Northern Division.*

November Term, 1916.

No. 3500.

UNITED STATES OF AMERICA,

Plaintiff,

v.

LOGAN BILLINGSLEY, *alias* FRED ADAMS,
alias JOE BUSH, FRED BILLINGSLEY,
WILLIAM H. PIELOW and WILLIAM
FRAZIER,

Defendants.

Indictment.

The United States of America,
Western District of Washington,
Northern Division,—ss.

The grand jurors of the United States of America,
duly selected, impaneled, sworn and charged to in-
quire within and for the Northern Division of the
Western District of Washington upon their oaths
present:

That on the first day of March, A. D. one thousand
nine hundred and sixteen, one Logan Billingsley,
and one Fred Billingsley, late of the city of Seattle,
in the county of King, State of Washington, were
conducting a so-called drug-store, known as and
called the Stewart Street Pharmacy, at 109 Stewart
Street in the city of Seattle and State of Washing-
ton, for the ostensible purpose of selling and dis-

dispensing drugs and other articles of merchandise to sundry persons, firms and corporations, comprising the public in general, whom they might interest in their drug articles, goods, wares and merchandise, in the city of Seattle, and State of Washington.

That on the first day of May, A. D. one thousand nine hundred and sixteen, one Logan Billingsley, and one [2] Fred Billingsley, late of the city of Seattle, in the county of King, State of Washington, were conducting a so-called drug-store known as and called the Night and Day Drug Company, or Night and Day Pharmacy, a more particular name being to the grand jurors unknown, at 1525 Third Avenue in the city of Seattle, and State of Washington, for the ostensible purpose of selling and dispensing drugs and other articles of merchandise to sundry persons, firms and corporations, comprising the public in general, whom they might interest in their drug articles, goods, wares and merchandise, in the city of Seattle, and State of Washington.

That during all the time herein mentioned, one William Frazier, late of the city of Seattle, in the county of King, State of Washington, was engaged in the transfer and drayage business in the said city of Seattle and was during the times herein mentioned employed by said Logan Billingsley and by said Fred Billingsley to act as the Frazier Transfer Company, for the purpose of transferring and draying the necessary property and more particularly the whiskey, beer and spirituous liquors used in the transaction of the business of said Logan Billingsley and said Fred Billingsley as herein described, and

as such at all times herein mentioned acted for and on behalf of said Billingsleys in the execution of all plans and in the furtherance of their said business, both in conjunction with said Billingsleys and in the interest and behalf of him, the said William Frazier.

That during all the time herein mentioned, one William H. Pielow was employed by the said Logan Billingsley, [3] one of the conspirators herein, to act as the transfer and drayman in the transaction of the business of said Logan Billingsley and said Fred Billingsley as herein described, and was so engaged under the name of and called The Pielow Transfer Company, and as such at all times herein mentioned acted for and on behalf of said Billingsleys in the execution of all plans and in the furtherance of their said business, both in conjunction with said Billingsleys and independently in the interest and behalf of said Billingsleys and in the interest and behalf of him, the said William H. Pielow.

That at all times herein mentioned the Jesse Moore Hunt Company was a corporation organized and existing under and by virtue of the laws of the State of California with its principal place of business in the city of San Francisco in said State of California, and was engaged in the business, among other things, of buying and selling whiskey, beer and other spirituous liquors at San Francisco, in the State of California, and were shippers of said liquors in interstate commerce, and as such, shipped a large amount of whiskey, beer and other spirituous liquors to Seattle, Washington, and to Port Stanley, Washington, from San Francisco, in the State of

California, and to other places in the United States, in interstate commerce over various lines of railroad, and steamship lines, to divers and sundry consignees to the grand jurors unknown. That Harry C. Hunt was President of said corporation and that Edward P. Baker was Manager of said corporation, and as such were officers, agents, servants and employees of said corporation as aforesaid. [4]

That during all the times herein mentioned, one Charles Young, late of the city of Seattle, in the county of King, State of Washington, was an agent, servant and employee of the said Jesse Moore Hunt Company, that is to say, salesman thereof in the prosecution of the business of the said Jesse Moore Hunt Company, as herein described, and as such at all times herein mentioned acted for and on behalf of the said Jesse Moore Hunt Company, in the execution of all plans and in the furtherance of said business both in conjunction with said Jesse Moore Hunt Company, and independently, in the interest and behalf of said corporation, and independently and in the interest and behalf of the said Billingsleys, and in the interest and behalf of him, the said Charles Young.

That on or about the first day of March, A. D. one thousand nine hundred and sixteen, at Seattle, King County, Washington, in the said division and district the said Logan Billingsley, the said Fred Billingsley and the said William Frazier and said William H. Pielow, unlawfully, feloniously, knowingly and corruptly did conspire, combine, confeder-

ate and agree with each other and with the said Jesse Moore Hunt Company, said Charles Young, said Edward P. Baker, and said Harry C. Hunt, agents, servants and employees for the firm of the Jesse Moore Hunt Company, a corporation, aforesaid, and acting for and on behalf of the said corporation, Jesse Moore Hunt Company, shipper of said whiskey, beer and spirituous liquor in interstate commerce as aforesaid, and conspiring, confederating and agreeing with divers and sundry other persons to the grand jury unknown, to commit an offense against the [5] United States, that is to say, the offense of making false entries in the records and memoranda kept by carriers, and by the means and device of falsifying the record, accounts and memoranda kept by carriers, more particularly the bill of lading of The Southern Pacific Company, a corporation, theretofore organized and during all the times mentioned in this indictment, existing under and by virtue of the laws of the State of Kentucky, and also the shipping instructions kept by said The Southern Pacific Company, corporation, common carrier, engaged in the transportation of property wholly by railroad, over its line and route, under contracts, agreements and arrangements with another connecting railroad company, to wit, the Oregon-Washington Railroad & Navigation Company, a corporation, theretofore organized and then existing under and by virtue of the laws of the State of Oregon, for the continuous carriage and shipment by railroad in interstate commerce from one state

of the United States, to other of those states, to wit, from San Francisco in the State of California to Seattle in the State of Washington, and also the delivery receipt kept by the said Oregon-Washington Railroad & Navigation Company at the city of Seattle, in the State of Washington, for the delivery of said shipment, each of which said railroad corporations, common carriers, were during all the times herein mentioned subject to the provisions of the Act of Congress approved February 4, 1887, entitled, "An Act to Regulate Commerce," and of the acts amendatory thereof and supplementary thereto. That as a part of said conspiracy and in forwarding and carrying out the same, the said Logan Billingsley, in Seattle aforesaid, entered into an oral agreement with the [6] said Jesse Moore Hunt Company, merchant and shipper in interstate commerce as aforesaid, by and through the said Charles Young, agent, servant and employee of said Jesse Moore Hunt Company, whereby the said Jesse Moore Hunt Company would thereafter ship to them, the said Logan Billingsley and said Fred Billingsley, over the railroad lines as aforesaid, in interstate commerce from San Francisco aforesaid, to Seattle aforesaid, shipments of liquor as thereafter ordered by them, the said Logan Billingsley and the said Fred Billingsley; that upon arrival of the said shipments in Seattle, deliveries were to be made to the transfer and drayage companies which were also to be thereafter designated by the, the said Logan Billingsley and the said Fred Billingsley; that the said Jesse Moore Hunt Company should make out and deliver

to said The Southern Pacific Company shipping directions as furnished by the, the said Logan Billingsley and said Fred Billingsley; that the said Jesse Moore Hunt Company should consign the same to the fictitious names of Ket Pharmacy, Raymer Pharmacy, Arket Pharmacy, Quail Pharmacy and Cherry Drug Company, and receive from the said The Southern Pacific Company a bill of lading for the shipments consigned to the last aforesaid pharmacies alleged to have been located in the city of Seattle; that the said Jesse Moore Hunt Company was to falsely note upon the shipping instructions kept by the said The Southern Pacific Company, that the said shipments of liquor were consigned to registered pharmacists in good standing; that the Jesse Moore Hunt Company should place upon the containers of the said liquor a false permit supposed to have been theretofore [7] issued by and through the County Auditor of King County Washington, theretofore lawfully authorized to issue such permits, all of which were requirements that the said conspirators and each of them well knew were necessary to conform to and abide by the laws of the State of Washington, and the requirements of the said corporation common carriers and was necessary in order to effect the object of the said conspiracy to have the said corporation common carriers, immediately upon delivery of the said shipments of liquor, so designate upon the said shipping instructions received by them, transport the same to the said fictitious consignees as aforesaid in the city of Seattle in the State of Washington and there deliver the same

to the said transfer companies as directed upon the shipping instructions by the said Jesse Moore Hunt Company and designated by them, the said Logan Billingsley and Fred Billingsley, so that as a result of said unlawful conspiracy and all of the acts done as aforesaid by the various parties to said conspiracy the said Jesse Moore Hunt Company, shippers in interstate commerce as aforesaid, and said William Frazier and said William H. Pielow might make false entries in the record and memoranda kept by said common carriers and by the means and device of falsifying the records, accounts and memoranda of the said common carriers in interstate commerce as aforesaid, from San Francisco, in the State of California, to Seattle, in the State of Washington.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That afterwards, to wit, throughout the months of March, April, May, June, July, August and September, one thousand nine hundred and sixteen, [8] and from time to time, the Jesse Moore Hunt Company acting for and on behalf of the said Logan Billingsley and Fred Billingsley, and for itself, and in furtherance of said unlawful conspiracy and to effect the object of the same, did deliver large quantities of whiskey, beer and spirituous liquors to said The Southern Pacific Company for transportation to the said Logan Billingsley and the said Fred Billingsley, and did deliver to and furnish said The Southern Pacific Company, with false, trumped-up and fictitious shipping directions for the same, the exact nature of all of which, and the exact quantities of all of which

said liquors, as well as the exact dates of all of the said shipments, are to the grand jurors unknown; that immediately upon and in pursuance of such shipping directions so falsified by said Jesse Moore Hunt Company, as a result of said unlawful conspiracy, confederation and agreement, said The Southern Pacific Company and the said connecting railroad company, transported said shipments of whiskey, beer and spirituous liquors to the false, fictitious and trumped-up consignees in the city of Seattle, State of Washington, in interstate commerce as aforesaid; that as a further part of said unlawful conspiracy and in forwarding and carrying out the object of the same, the said Jesse Moore Hunt Company did designate upon the said shipping instructions so furnished The Southern Pacific Company and said Oregon-Washington Railroad & Navigation Company that the said whiskey, beer and spirituous liquors was to be delivered to the said fictitious pharmacies in the city of Seattle, that the said fictitious pharmacies, were registered pharmacists in good standing in the city of [9] Seattle, and that upon arrival in the said city of Seattle were to be delivered to the said fictitious pharmacists by the Pielow Transfer Company and said Frazier Transfer Company.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That afterwards, to wit, throughout the months of March, April, May, June, July, August and September, one thousand nine hundred and sixteen, and from time to time, the said Pielow Transfer Company and said Frazier

Transfer Company acting for and on behalf of said Logan Billingsley and said Fred Billingsley, and for themselves, and acting through and by the said William H. Pielow and William Frazier and in furtherance of said unlawful conspiracy and to effect the object of the same did receive at Seattle, the delivery of the said large quantities of whiskey, beer and spirituous liquors, so delivered to the said The Southern Pacific Company, by the Jesse Moore Hunt Company, and by them transported in interstate commerce from San Francisco aforesaid to Seattle aforesaid over its line and the lines of said Oregon-Washington Railroad & Navigation Company and so consigned to the said false, trumped-up and fictitious pharmacists, and did thereupon falsely receipt to the said Oregon-Washington Railroad & Navigation Company and make a false entry in the records and memoranda kept by said Oregon-Washington Railroad & Navigation Company and by the means and device of falsifying the record, accounts and memoranda of said Oregon-Washington Railroad & Navigation Company in this, that the said William H. Pielow, said William Frazier, as a part of said unlawful conspiracy, confederation and [10] agreement and to effect the object of the same falsely signed the delivery orders kept by the railroad company.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That further in pursuance of the said unlawful conspiracy, confederation and agreement, and to effect the object of the

same, the said Jesse Moore Hunt Company on or about the third day of July, A. D. one thousand nine hundred and sixteen, at San Francisco aforesaid, unlawfully and feloniously did enter upon the record and memoranda kept by the said The Southern Pacific Company that the said Raymer Pharmacy was a registered pharmacist in good standing, a copy of which said record and memoranda is in the following words and figures, to wit: [11]

Uniform Bill of Lading—Standard form of Straight Bill of Lading approved by the Interstate Commerce Commission by Order No. 787 of June 27, 1908, including provisions to conform with the requirements of the Cummins Amendment to the Act to Regulate Commerce, effective June 2, 1915.

STRAIGHT BILL OF LADING — ORIGINAL—
NOT NEGOTIABLE.

Shippers No. —

SHIPPING ORDER, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading by

SOUTHERN PACIFIC COMPANY.

Agents No. —

at San Francisco 7-3-16 191—from

JESSE MOORE HUNT CO.

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery

at said destination, if on its road, otherwise to deliver to another carrier on the route to the said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any part of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from _____ to _____ is in Cents per
100 lbs.

IF TIMES 1st	IF 1st CLASS	IF 2d CLASS	IF 3d CLASS
IF 4th CLASS	IF 5th CLASS	IF A CLASS	IF B CLASS
IF C CLASS	IF D CLASS	IF E CLASS	IF COMMODITY

(Mail Address—Not for purposes of Delivery.)

Consigned to Raymer Pharmacy

Destination Seattle, Wn. State of

So. Pac. to Portland County of

Route % No. Pac. Rail. To Car Initial _____ Car No. _____

TERRY AVE. STATION, SEATTLE, WN.

Continued on next page.

No. Pack- ages.	Description of Articles and Special Marks.	Weight (Subject to Correction.)	Class or Rate.	Check Column.
1	Brls. Whiskey	430 Lbs.		
1	Cask Whiskey (Glass)	375 Lbs.		

Consigned to a registered Pharmacist in good standing.

If Charges are to be prepaid, write
or stamp here, "To be prepaid."

Received \$——— to apply in pre-
payment of the charges on the prop-
erty described hereon.

Agent or Cashier.

Per

(The signature here acknowledges
only the amount prepaid.)

Charges Advanced:

\$ Agent.

JESSE MOORE HUNT CO.,

Shipper.

Per (Signed) W. Dickson.

Per

(This Bill of Lading is to be signed
by the shipper and agent of the car-
rier, issuing same.)

[13]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That further in pursuance of said unlawful conspiracy, confederation and agreement, and to effect the object of the same, the said William H. Pielow on or about the eleventh day of July, A. D. one thousand nine hundred and sixteen, at Seattle, King County, Washington, afore-
said, in the division and district aforesaid, un-
lawfully and feloniously did enter upon the records and memoranda kept by said Oregon-Washington Railroad & Navigation Company, that the said Pie-
low Transfer Company would deliver the said

whiskey so shipped as aforesaid to the Raymer Pharmacy, a copy of which false entry is upon the record and memoranda kept by a common carrier, and is in the following words and figures, to wit:
[14]

UNION PACIFIC SYSTEM.		2568
Sea.		
Consignee Raymer Phacy.	Station 7-11	1916.
Destination —————	Freight)	
Route Terry Ave. Station.	Bill No.)	
(Point of Origin to Destination)		
To OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, Dr.,		
For Charges on Articles Transported:		
Waybilled From	Waybill Date and No.	Full Name of Shipper.
Friseo, Cal.	7/3-1423	J. M. H. Co.
		Car Initials and No.
		N. P. 27162
Point and Date of Shipment	Connecting Line Reference	
Previous Waybill References	Original Car, Initials and No.	
Number of Packages,		
Articles and Marks.	Weight.	Rate. Freight. Advances. Total.
1 Bbl. Whiskey 4798	430	
1 csk. Whiskey 4890	375	
*Total Prepaid		
\$.....		
Received pay for the Com-	Total	_____
pany, ————191—	Prepaid	_____
Pielow Trans. Co.	To Collect	_____
Per W. H. Pielow.	Make Checks Payable to the Com-	
	pany.	

*For use at junction points on freight subject to connecting line settlement.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That further in pursuance of the said unlawful conspiracy, confederation and agreement, and to effect the object of the same, the said Jesse Moore Hunt Company on or about the first day of July, A. D. one thousand nine hundred and sixteen, at San Francisco aforesaid, unlawfully and feloniously did enter upon the record and memoranda kept by the said The Southern Pacific Company that the said Raymer Pharmacy was a registered pharmacist in good standing, a copy of which said record and memoranda is in the following words and figures, to wit: [16]

Uniform Bill of Lading—Standard form of Straight Bill of Lading approved by the Interstate Commerce Commission by Order No. 787 of June 27, 1908, including provisions to conform with the requirements of the Cummins Amendment to the Act to Regulate Commerce, effective June 2, 1915.

STRAIGHT BILL OF LADING—ORIGINAL—
NOT NEGOTIABLE.

Shippers No. —

SHIPPING ORDER, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading by

SOUTHERN PACIFIC COMPANY

Agents No.—

at San Francisco 7-1-16 191— from

JESSE MOORE HUNT CO.

the property described below, in apparent good

order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to the said destination. It is mutually agreed as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any part of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from _____ to _____ is in Cents per
100 lbs.

IF TIMES 1st	IF 1st CLASS	IF 2d CLASS	IF 3d CLASS
IF 4th CLASS	IF 5th CLASS	IF A CLASS	IF B CLASS
IF C CLASS	IF D CLASS	IF E CLASS	IF COMMODITY

(Mail Address—Not for purposes of Delivery.)

Consigned to Raymer Pharmacy.

Seattle, Wn.

Destination So. Pac. to Portland

State of _____

% No. Pac.

County of _____

Route Rail to Terry Ave. Station,

Car Initial _____ Car No. _____

Seattle, Wn.

No. Pack- ages.	Description of Articles and Special Marks.	Weight (Subject to Correction.)	Class or Rate.	Check Column.
1	Brls. Whiskey	440 lbs.		
1	Cask Whiskey (16 doz. Pints)			

Consigned to a registered Pharmacist in good standing.

If Charges are to be prepaid, write
or stamp here, "To be prepaid."

.....

Received \$——— to apply in pre-
payment of the charges on the prop-
erty described hereon.

.....

Agent or Cashier.

Per

(The signature here acknowledges
only the amount prepaid.

Charges Advanced:

\$

..... Agent.

JESSE MOORE HUNT CO.,

Per

Shipper.

(This Bill of Lading is to be signed

Per W. Dickson.

by the shipper and agent of the car-
rier, issuing same.)

[18]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That further in pursuance of said unlawful conspiracy, confederation and agreement, and to effect the object of the same, the said William Frazier on or about the eleventh day of July, A. D. one thousand nine hundred and sixteen, at Seattle, King County, Washington, aforesaid, in the division and district aforesaid, unlawfully and feloniously did enter upon the records and memoranda kept by said Oregon-Washington Railroad & Navigation Company that the said Frazier Transfer Company would deliver the said whiskey

so shipped as aforesaid to the Raymer Pharmacy, a copy of which false entry is upon the record and memoranda kept by a common carrier, and is in the following words and figures, to wit: [19]

UNION PACIFIC SYSTEM.

2339

Seattle Station 7-11 1916

Freight)

Consignee Raymer Phey.

Bill No.) _____

Destination _____

Route Seattle

(Point of Origin to Destination)

To OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, Dr.,

For Charges on Articles Transported:

Waybilled From Waybill Date and No. Full Name of Shipper.

San Fran. Cal. 7/1/16 50 Jesse Moore Hunt Co.

Car Initials and No.

C. & A. 38498

Point and Date of Shipment

Connecting Line Reference

Number of Packages,

Articles and Marks. Weight. Rate. Freight. Advances. Total.

41 180

1 Bbl. Whiskey 440 25 110

1 Csk. Whiskey 51

16 doz. Pints 400 30 320

610

Permit 4796 4864

*Total Prepaid

\$.....

Frazier F. T. Co.,

Total _____

Consignee.

Prepaid _____

To Collect _____

Make Checks Payable to the Company.

*For use at junction points on freight subject to connecting line settlement.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That further in pursuance of the said unlawful conspiracy, confederation and agreement, and to effect the object of the same, the said Jesse Moore Hunt Company on or about the twenty-second day of June, A. D. one thousand nine hundred and sixteen, at San Francisco aforesaid, unlawfully and feloniously did enter upon the record and memoranda kept by the said The Southern Pacific Company that the said Ket Pharmacy was a registered pharmacist in good standing, a copy of which said record and memoranda is in the following words and figures, to wit: [21]

Uniform Bill of Lading—Standard form of Straight Bill of Lading approved by the Interstate Commerce Commission by Order No. 787 of June 27, 1908, including provisions to conform with the requirements of the Cummins Amendment to the Act to Regulate Commerce, effective June 2, 1915.

STRAIGHT BILL OF LADING—ORIGINAL—
NOT NEGOTIABLE.

Shippers No. —

SHIPPING ORDER, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading by

SOUTHERN PACIFIC COMPANY.

Agents No. —

at San Francisco 6-22-16 191— from JESSE
MOORE HUNT CO.

the property described below, in apparent good

order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to the said destination. It is mutually agreed as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any part of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from _____ to _____ is in Cents per
100 lbs.

IF TIMES 1st	IF 1st CLASS	IF 2d CLASS	IF 3d CLASS
IF 4th CLASS	IF 5th CLASS	IF A CLASS	IF B CLASS
IF C CLASS	IF D CLASS	IF E CLASS	IF COMMODITY

(Mail Address—Not for purposes of Delivery.)

Consigned to Ket. Pharmacy

Destination _____ State of _____

! County of _____.

Route Seattle, Wn. Car Initial _____ Car No. _____

Continued on next page.

Logan Billingsley vs.

No. Pack- ages.	Description of Articles and Special Marks.	Weight (Subject to Correction.)	Class or Rate.	Check Column.
2	Brls. Whiskey	840 Lbs.		

Consigned to a registered pharmacy in good standing.

If Charges are to be prepaid, write
or stamp here, "To be prepaid."

Received \$—— to apply in pre-
payment of the charges on the prop-
erty described hereon.

Agent or Cashier.

Per

(The signature here acknowledges
only the amount prepaid.

Charges Advanced:

\$

..... Agent.

Per

(This Bill of Lading is to be signed
by the shipper and agent of the car-
rier, issuing same.)

JESSE MOORE HUNT CO.,

Shipper.

Per (Signed) W. Dickson.

[23]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That further in pursuance of said unlawful conspiracy, confederation and agreement, and to effect the object of the same, the said William Frazier on or about the twenty-eighth of June, A. D. one thousand nine hundred and sixteen, at Seattle, King County, Washington, aforesaid, in the division and district aforesaid, unlawfully and feloniously did enter upon the records and memoranda kept by said Oregon-Washington Railroad & Navigation Company that the said Frazier Transfer Company would deliver the said whiskey so shipped as aforesaid to the Ket Pharmacy,

a copy of which false entry is upon the record and memoranda kept by a common carrier, and is in the following words and figures, to wit: [24]

UNION PACIFIC SYSTEM.

Sea.	System 6/28	1916
	Freight)	
Consignee Ket. Phcy.	Bill No.)	_____
Destination _____		
Route _____		

(Point of Origin to Destination)

To OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, Dr.,

For Charges on Articles Transported:

Waybilled From	Waybill Date and No.	Full Name of Shipper.
San Fran.	6/23 SP8146	J. Moore H. Co.

Car Initials and No.

U. N. P. 78182

Point and Date of Shipment	Connecting Line Reference
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Previous Waybill References	Original Car, Initials and No.
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Number of Packages,

Articles and Marks.	Weight.	Rate.	Freight.	Advances.	Total.
---------------------	---------	-------	----------	-----------	--------

2 Brl. Whiskey	785				
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Per 4915-16

*Total Prepaid

\$

Frazier C. T. Co.

Total_____

Consignee.

Prepaid_____

To Collect_____

Make Checks Payable to the Company.

*For use at junction points on freight subject to connecting line settlement.

[25]

COUNT II.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on the first day of March, A. D. one thousand nine hundred and sixteen, one Logan Billingsley and one Fred Billingsley, late of the city of Seattle, in the County of King, State of Washington, were conducting a so-called drug-store, known as and called the Stewart Street Pharmacy, at 109 Stewart Street in the city of Seattle, and State of Washington, for the ostensible purpose of selling and dispensing drugs and other articles of merchandise to sundry persons, firms and corporations, comprising the public in general, whom they might interest in their drug articles, goods, wares and merchandise, in the city of Seattle, and State of Washington.

That on the first day of May, one thousand nine hundred and sixteen, one Logan Billingsley and one Fred Billingsley, late of the city of Seattle, in the County of King, State of Washington, were conducting a so-called drug-store, known as and called the Night and Day Drug Company, or the Night and Day Pharmacy, a more particular name being to the grand jurors unknown, at 1525 Third Avenue in the city of Seattle, and State of Washington, for the ostensible purpose of selling and dispensing drugs and other articles of merchandise to sundry persons, firms and corporations, comprising the public in general, whom they might interest in their drug articles, goods, wares and merchandise, in the city of Seattle, and State of Washington.

That during all the time herein mentioned one William Frazier, late of the city of Seattle, in the county [26] of King, State of Washington, was engaged in the transfer and drayage business in the said city of Seattle and was during the times herein mentioned employed by said Logan Billingsley and by said Fred Billingsley to act as the Frazier Transfer Company for the purpose of transferring and draying the necessary property and more particularly the whiskey, beer and spirituous liquors used in the transaction of the business of said Logan Billingsley and said Fred Billingsley as herein described, and as such at all times herein mentioned acted for and on behalf of said Billingsleys in the execution of all plans and in the furtherance of their said business, both in conjunction with said Billingsleys and independently in the interest and behalf of said Billingsleys and in the interest and behalf of him, the said William Frazier.

That during all the times herein mentioned, one William H. Pielow, was employed by the said Logan Billingsley, one of the conspirators herein, to act as the transfer and drayman in the transaction of the business of said Logan Billingsley and said Fred Billingsley as herein described, and was so engaged under the name of and called The Pielow Transfer Company, and as such at all times herein mentioned acted for and on behalf of said Billingsleys in the execution of all plans and in the furtherance of their said business, both in conjunction with said Billingsleys and independently in the interest and behalf of said Billingsleys and in the interest and behalf of

him, the said William H. Pielow.

That at all times herein mentioned the Jesse Moore Hunt Company was a corporation organized and existing under [27] and by virtue of the laws of the State of California with its principal place of business in the city of San Francisco, in said State of California, and was engaged in the business, among other things, of buying and selling whiskey, beer and other spirituous liquors at San Francisco, in the State of California, and were shippers of said liquors in interstate commerce, and as such shipped a large amount of whiskey, beer and other spirituous liquors to Seattle, Washington, from San Francisco, in the State of California, and to other places in the United States, and more particularly into the Territory of Alaska, through the State of Washington, and the Northern Division of the Western District of Washington, in interstate commerce over various lines of railroad, and steamship lines, to divers and sundry consignees to the grand jurors unknown. That Harry C. Hunt was President of said corporation, and that Edward P. Baker was Manager of said corporation, and as such were officers, agents, servants and employees of said corporation as aforesaid.

That during all of the times herein mentioned, one Charles Young, late of the city of Seattle, in the county of King, State of Washington, was an agent, servant and employee of the said Jesse Moore Hunt Company, that is to say, salesman thereof in the prosecution of the business of the said Jesse Moore Hunt Company, as herein described, and as such, at all times herein mentioned acted for and on behalf

of the said Jesse Moore Hunt Company, in the execution of all plans and in the furtherance of said business both in conjunction with said Jesse Moore Hunt Company, and independently and in the interest and behalf of said Billingsleys, and in the interest and behalf of him, the [28] said Charles Young.

That on or about the first day of March, A. D. one thousand nine hundred and sixteen, at Seattle, King County, Washington, in the said division and district, the said Logan Billingsley, the said Fred Billingsley and the said William Frazier and said William H. Pielow, unlawfully, feloniously, knowingly and corruptly did conspire, confederate and agree with each other and with the said Jesse Moore Hunt Company, said Charles Young, said Edward P. Baker, and said Harry C. Hunt, agents, servants and employees for the firm of the Jesse Moore Hunt Company, a corporation, aforesaid, and acting for and on behalf of the said corporation, Jesse Moore Hunt Company, shipper of said whiskey, beer and spirituous liquor in interstate commerce as aforesaid, and conspiring, confederating, and agreeing with divers and sundry other persons to the grand jury unknown, to commit an offense against the United States, that is to say, the offense of making false entries in the records and memoranda kept by carriers, and by the means and device of falsifying the record, accounts and memoranda kept by carriers, more particularly the bill of lading of The Southern Pacific Company, a corporation, theretofore organized and during all times mentioned in this indictment, existing under and by virtue of the laws of the State of

Kentucky, and also the shipping instructions kept by said The Southern Pacific Company, corporation, common carrier, engaged in the transportation of property wholly by railroad, over its line and route, under contracts, agreements and arrangement with another connecting railroad company, to wit, the Oregon-Washington Railroad and Navigation Company, a corporation, theretofore [29] organized and existing under and by virtue of the laws of the State of Oregon, for the continuous carriage and shipment by railroad in interstate commerce from one State of the United States, to other of those States, to wit, from San Francisco, in the State of California, to Seattle, in the State of Washington, and also the delivery receipt kept by the said Oregon-Washington Railroad and Navigation Company at the city of Seattle, in the State of Washington, for the delivery of said shipment to the transfer and drayage companies, each of which said railroad corporations, common carriers, were, during all the times herein mentioned, subject to the provisions of the Act of Congress approved February 4, 1887, entitled, "An Act to Regulate Commerce," and of the acts amendatory thereof and supplementary thereto. That as a part of said conspiracy and in forwarding and carrying out the same, the said Logan Billingsley, in Seattle aforesaid, entered into an oral agreement with the said Jesse Moore Hunt Company; merchant and shipper, in interstate commerce as aforesaid by and through the said Charles Young, agent, servant and employee of said Jesse Moore Hunt Company, whereby the said Jesse Moore Hunt

Company would thereafter ship to them, the said Logan Billingsley and said Fred Billingsley, over the railroad lines as aforesaid in interstate commerce from San Francisco aforesaid, to Seattle aforesaid, shipments of liquor as thereafter ordered by the, the said Logan Billingsley and the said Fred Billingsley; that upon arrival of the said shipments in Seattle, deliveries were to be made to the transfer and drayage companies which were also to be thereafter designated by them, the said Logan Billingsley and the said Fred [30] Billingsley; that the said Jesse Moore Hunt Company should make out and deliver to said The Southern Pacific Company shipping directions as furnished by them, the said Logan Billingsley and said Fred Billingsley; that the said Jesse Moore Hunt Company should consign the same to the names of John Amber, McCarthy, Alaska; Pete Carlson, Juneau, Alaska; James Brennan, Petersburg, Alaska; Tim Vogel, Haines, Alaska; Cain Hotel Co., Juneau, Alaska, and receive from the said The Southern Pacific Company a bill of lading for the shipments consigned to the last aforesaid consignees located in Alaska; that the said Jesse Moore Hunt Company was to falsely note upon the shipping instructions kept by the said The Southern Pacific Company, that the said shipments of liquor were consigned to and intended for said consignees in said Alaska; that the Jesse Moore Hunt Company should place upon the bills of lading and shipping instructions, the names of the consignees and destination, well knowing that said shipments were not intended to be shipped to Alaska, all of which were

requirements that the said conspirators and each of them well knew were necessary in order to comply with the rules and regulations of the said corporation common carriers, and was necessary in order to effect the object of the said conspiracy to have the said corporation common carriers immediately upon delivery of the said shipments of liquor, so designate upon the said shipping instructions received by them, transport the same to the said consignees as aforesaid in the said Territory of Alaska, and at the city of Seattle, in the State of Washington, deliver the same to the said transfer companies as directed upon the shipping instructions [31] by the said Jesse Moore Hunt Company and designated by them the said Logan Billingsley and Fred Billingsley, so that as a result of said unlawful conspiracy and all of the acts done as aforesaid by the various parties to said conspiracy the said Jesse Moore Hunt Company, shippers in interstate commerce as aforesaid, and said William Frazier and said William H. Pielow might make false entries in the record and memoranda kept by said common carriers and by the means and device of falsifying the records, accounts and memoranda of the said common carriers in interstate commerce as aforesaid, from San Francisco, in the State of California, to Seattle, in the State of Washington.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That afterwards, to wit, throughout the months of July, August and September, A. D. one thousand nine hundred and sixteen, and from time to time, the Jesse Moore Hunt

Company acting for and on behalf of the said Logan Billingsley and Fred Billingsley, and for itself, and in furtherance of said unlawful conspiracy and to effect the object of the same, did deliver large quantities of whiskey, beer and spirituous liquors to said The Southern Pacific Company for transportation to the said Logan Billingsley and the said Fred Billingsley, and did deliver to and furnish said The Southern Pacific Company, with false, trumped-up and fictitious shipping directions for the same, the exact nature of all of which, and the exact quantities of all of which said liquors, as well as the exact dates of all of the said shipments, are to the grand jurors, unknown; that immediately upon and in pursuance of such shipping directions so falsified [32] by said Jesse Moore Hunt Company, as a result of said unlawful conspiracy, confederation and agreement said The Southern Pacific Company and the said connecting railroad company, transported said shipments of whiskey, beer, and spirituous liquors to the false, fictitious and trumped-up consignees and destinations to the city of Seattle, State of Washington, in interstate commerce as aforesaid, and there delivered the same to said transfer and drayage companies for transfer to the steamship line for continued shipment and carriage to Alaska aforesaid.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That afterwards, to wit, throughout the months of July, August, and September, A. D. one thousand nine hundred and sixteen, and from time to time, the said Pielow Transfer Company and said Frazier Transfer Company acting

for and on behalf of said Logan Billingsley and said Fred Billingsley and for themselves, and acting through and by the said William H. Pielow, and William Frazier, and in furtherance of said unlawful conspiracy and to effect the object of the same did receive at Seattle, the delivery of the said large quantities of whiskey, beer and spirituous liquors, so delivered to the said The Southern Pacific Company, by the Jesse Moore Hunt Company, and by them transported in interstate commerce from San Francisco aforesaid to Seattle aforesaid over its line and the lines of said Oregon-Washington Railroad & Navigation Company and so consigned to the said false, trumped-up and fictitious consignees and destinations, and did thereupon falsely receipt to the said Oregon-Washington Railroad & Navigation Company and make a false entry in the records and memoranda kept by [33] said Oregon-Washington Railroad & Navigation Company and by the means and device of falsifying the record, accounts and memoranda of said Oregon-Washington Railroad & Navigation Company in this, that the said William H. Pielow, said William Frazier as a part of said unlawful conspiracy, confederation and agreement, and to effect the object of the same, falsely signed the delivery orders kept by the railroad company.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That further in pursuance of the said unlawful conspiracy, confederation and agreement, and to effect the object of the same, the said Jesse Moore Hunt Company on or about the eighth day of September, A. D. one thousand nine hundred and sixteen, at San Francisco,

aforesaid, unlawfully and feloniously did enter upon the record and memoranda kept by the said The Southern Pacific Company, that the said John Amber of McCarthy, Alaska, was the consignee thereof, a copy of which said record and memoranda is in the following words and figures, to wit: [34]

Uniform Bill of Lading—Standard form of Straight Bill of Lading approved by the Interstate Commerce Commission by Order No. 787 of June 27, 1908, including provisions to conform with the requirements of the Cummins Amendment to the Act to Regulate Commerce, effective June 2, 1915.

STRAIGHT BILL OF LADING—ORIGINAL—
NOT NEGOTIABLE.

Shippers No. —

SHIPPING ORDER, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading by

SOUTHERN PACIFIC COMPANY.

Agents No. —.

at San Francisco 9-8-16 191 from JESSE MOORE HUNT CO. the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to the said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any

portion of said route to destination, and as to each party at any time interested in all or any part of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and assigns.

The Rate of Freight from _____ to _____ is in Cents per 100 lbs.

IF TIMES 1st	IF 1st CLASS	IF 2d CLASS	IF 3d CLASS
IF 4th CLASS	IF 5th CLASS	IF A CLASS	IF B CLASS
IF C CLASS	IF D CLASS	IF E CLASS	IF COMMODITY

(Mail Address—Not for purposes of Delivery.)

Consigned to John Amber State of _____
 Destination McCarthy, Alaska County of _____
 Route c/o Lloyd Transfer Co. Car Initial O. W. R. Car No. 15808
 at Seattle.

c/o O. & W. out of Portland.

Continued on next page.

[35]

No. Pack- ages.	Description of Articles and Special Marks.	Weight (Subject to Correction.)	Class or Rate.	Check Column.
2	Brls. Whiskey	880 lbs.		
20	Large Cases Whiskey			

SMALL CAR ORDERED

SHIPPERS LOAD

R. R. Comt.

If Charges are to be prepaid, write or stamp here, "To be prepaid."

.....
 Received \$_____ to apply in pre-
 payment of the charges on the prop-
 erty described hereon.

.....
 Agent or Cashier.

Per
 (The signature here acknowledges
 only the amount prepaid.)

Charges Advanced:

\$
 Agent.

Per _____

(This Bill of Lading is to be signed
 by the shipper and agent of the car-
 rier, issuing same.)

JESSE MOORE HUNT CO.,

Shipper.

Per W. Dickson.

[36]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That further in pursuance of said unlawful conspiracy, confederation and agreement, and to effect the object of the same, the said W. H. Pielow on or about the fifteenth day of September, A. D. one thousand nine hundred and sixteen, at Seattle, King County, Washington, aforesaid, in the division and district aforesaid, unlawfully and feloniously did enter upon the records and memoranda kept by said Oregon-Washington Railroad & Navigation Company, that the said Pielow Transfer Company would deliver the said whiskey so shipped as aforesaid to the steamship line for continued shipment and transportation to McCarthy, Alaska, a copy of which false entry is upon the records and memoranda kept by a common carrier, and is in the following words and figures, to wit: [37]

UNION PACIFIC SYSTEM.

Seattle, Wn.,	9/15/16.	Station 15008	191—
		Freight)	
Consignee John Amber		Bill No.)	_____
Destination McCarthy, Alaska Care Lloyd Transfer Co., at Seattle.			
Route _____			

(Point of Origin to Destination)

To OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, Dr.,

For Charges on Articles Transported:

Waybilled From	Waybill Date and No.	Full Name of Shipper.
San Fran. Cal.	9-8-16 S. P. 1813	Jesse Moore Hunt Co.

Car Initials and No.

Point and Date of Shipment	Connecting Line Reference
----------------------------	---------------------------

Previous Waybill References	Original Car, Initials and No.
-----------------------------	--------------------------------

Number of Packages,

Articles and Marks.	Weight.	Rate.	Freight.	Advances.	Total.
---------------------	---------	-------	----------	-----------	--------

2 Bbls. Whiskey	880m				
-----------------	------	--	--	--	--

20 Large CS. DO.	6560				
------------------	------	--	--	--	--

Shippers papers attached to W/B

*Total Prepaid

\$

Received payment for the com-	Total
pany ————191—	Prepaid

Pielow Transfer Co.

To Collect

Per R. B. Brennan.

Make Checks Payable to the Com-
pany.

*For use at junction points on freight subject to connecting line settlement.

[38]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That further in pursuance of the said unlawful conspiracy, confederation and agreement, and to effect the object of the same, the said Jesse Moore Hunt Company on or about the eleventh day of September, A. D. one thousand nine hundred and sixteen, at San Francisco, aforesaid, unlawfully and feloniously did enter upon the record and memoranda kept by the said The Southern Pacific Company that the said James Brennan of Petersburg, Alaska, was consignee thereof, a copy of which said record and memoranda is in the following words and figures, to wit: [39]

Uniform Bill of Lading—Standard form of Straight Bill of Lading approved by the Interstate Commerce Commission by Order No. 787 of June 27, 1908, including provisions to conform with the requirements of the Cummins Amendment to the act to regulate Commerce, effective June 2, 1915.

STRAIGHT BILL OF LADING—ORIGINAL—
NOT NEGOTIABLE.

Shippers No. —

SHIPPING ORDER, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading by

SOUTHERN PACIFIC COMPANY.

Agents No. —

at San Francisco 9/11/16 191— from JESSE
MOORE HUNT CO.

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to the said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any part of said property, that every service to be performed hereunder shall be subject to all the conditions whether printed or written, herein contained (including con-

ditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from _____ to _____ is in Cents per 100 lbs.

IF TIMES 1st IF 1st CLASS IF 2d CLASS IF 3d CLASS
IF 4th CLASS IF 5th CLASS IF A CLASS IF B CLASS
IF C CLASS IF D CLASS IF E CLASS IF COMMODITY

(Mail Address—Not for purposes of Delivery.)

Consigned to James Brennan

Destination Petersburg State of Alaska

Route c/o Lloyd Transfer Co. County of

c/o O. & W. out of Portland at Seattle.

Car Initial U. P. Car No. 95347

Continued on next page.

[40]

No. Pack- ages.	Description of Articles and Special Marks.	Weight (Subject to Correction.)	Class or Rate.	Check Column.
-----------------------	---	---------------------------------------	----------------------	------------------

34	Large Cases Whiskey			
2	Barrels Whiskey			

SMALL CAR ORDERED
Prepay to Seattle.

Shippers load and R. R. cont.

If Charges are to be prepaid, write or stamp here, "To be prepaid."

.....

Received \$_____ to apply in pre-
payment of the charges on the prop-
erty described hereon.

.....

Agent or Cashier.

Per

(The signature here acknowledges
only the amount prepaid.

Charges Advanced:

\$
..... Agent.

Per

JESSE MOORE HUNT CO.,

Shipper. (This Bill of Lading is to be signed
by the shipper and agent of the car-
rier, issuing same.)

Per W. Dickson.

[41]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That further in pursuance of said unlawful conspiracy, confederation and agreement, and to effect the object of the same, the said William Frazier on or about the nineteenth day of September, A. D. one thousand nine hundred and sixteen, at Seattle, King County, Washington, aforesaid, in the division and district aforesaid, unlawfully and feloniously did enter upon the records and memoranda kept by said Oregon-Washington Railroad & Navigation Company that the said Frazier Transfer Company would deliver the said whiskey so shipped as aforesaid to the steamship line for continued shipment and transportation to Petersburg, Alaska, a copy of which false entry is upon the record and memoranda kept by a common carrier, and is in the following words and figures, to wit: [42]

UNION PACIFIC SYSTEM.

Seattle, Wn. 9/19/16.	Station 15660½	1916
Consignee James Brennan	Freight)	
Destination Petersburg, Alaska.	Bill No.) _____	
Route _____		

(Point of Origin to Destination)

To OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, Dr.,

For Charges on Articles Transported:

Waybilled From	Waybill Date and No.	Full Name of Shipper.
San Fran. Cal.	9-12-16 2424	J. M. Hunt Co.
		Car Initials and No.
		U. P. 95347

Point and Date of Shipment	Connecting Line Reference
Previous Waybill References	Original Car, Initials and No.

Number of Packages,

Articles and Marks.	Weight.	Rate.	Freight.	Advances.	Total.
34 CS. WHKY.	6970				
2 BBL. WHISKY	870				

DECLARATION PAPERS ATTACHED

*Total Prepaid

\$

Received payment for the com-	Total	_____
pany, _____191—	Prepaid	_____
Lloyd Trans. Co.	To Collect	_____
per R. B. Brennan		

Make Checks Payable to the Com-
pany.

*For use at junction points on freight subject to connecting line settle-
ment.

[43]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That further in pursuance of said unlawful conspiracy, confederation and agreement, and to effect the object of the same, the said Jesse Moore Hunt Company on or about the second day of September, A. D. one thousand nine hundred and sixteen, at San Francisco aforesaid, unlawfully and feloniously did enter upon the record and memoranda kept by the said The Southern Pacific Company that the said John Amber of McCarthy, Alaska was the consignee thereof, a copy of which record and memoranda is in the following words and figures, to wit: [44]

Uniform Bill of Lading—Standard form of Straight Bill of Lading approved by the Interstate Commerce Commission by Order No. 787 of June 27, 1908, including provisions to conform with the requirements of the Cummins Amendment to the act to regulate Commerce, effective June 2, 1915.

STRAIGHT BILL OF LADING—ORIGINAL—
NOT NEGOTIABLE.

Shippers No. —

SHIPPING ORDER, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading by

SOUTHERN PACIFIC COMPANY.

Agents No. —

at San Francisco 9/2/16— 191— from JESSE
MOORE HUNT CO.

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to the said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any part of said property, that every service to be performed hereunder shall be subject to all the conditions whether printed or written, herein contained (including con-

ditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from _____ to _____ is in Cents per 100 lbs.

IF TIMES 1st	IF 1st CLASS	IF 2d CLASS	IF 3d CLASS
IF 4th CLASS	IF 5th CLASS	IF A CLASS	IF B CLASS
IF C CLASS	IF D CLASS	IF E CLASS	IF COMMODITY

(Mail Address—Not for purposes of Delivery.)

Consigned to John Amber

Destination McCarthy, Alaska

State of _____

Route c/o Pielow Transfer Co.,

County of _____

at Seattle.

Car Initial G. H. Car No. 34520

c/o O. & W. out of Portland.

Continued on next page.

[45]

No. Pack- ages.	Description of Articles and Special Marks.	Weight (Subject to Correction.)	Class or Rate.	Check Column.
8	Brls. Whiskey			
10	Large Cases Whiskey			

Received subject to indefinite delay on a/c impending strikes.

Minimum car ordered loaded by shipper.

If Charges are to be prepaid, write or stamp here, "To be prepaid."

.....

Received \$_____ to apply in prepayment of the charges on the property described hereon.

.....

Agent or Cashier.

Per

(The signature here acknowledges only the amount prepaid.

Charges Advanced:

\$

..... Agent.

Per

JESSE MOORE HUNT CO.,

Shipper.

(This Bill of Lading is to be signed by the shipper and agent of the carrier, issuing same.)

Per W. Dickson,

[46]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present: That further in pursuance of said unlawful conspiracy, confederation and agreement, and to effect the object of the same, the said William Frazier on or about the ninth day of September, A. D. one thousand nine hundred and sixteen, at Seattle, King County, Washington, aforesaid, in the division and district aforesaid, unlawfully and feloniously did enter upon the records ani memoranda kept by said Oregon-Washington Railroad & Navigation Company that the said Pielow Transfer Company would deliver the said whiskey so shipped as aforesaid to the steamship line for continued shipment and transportation to McCarthy, Alaska, a copy of which false entry is upon the record and memoranda kept by a common carrier, and is in the following words and figures, to wit: [47]

UNION PACIFIC SYSTEM.

Sea.	Station 9-9	1916
Consignee John Amber	Freight)	
Destination, McCarthy, Ala.	Bill No.) 14202	
Route		

(Point of Origin to Destination)

To OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, Dr.,

For Charges on Articles Transported:

Waybilled From	Waybill Date and No.	Full Name of Shipper.
San Fran.	593 9/2	J. M. Hunt

Car Initials and No.

GH. 34520

Point and Date of Shipment

Connecting Line Reference

Previous Waybill References

Original Car, Initials and No.

Number of Packages,		Articles and Marks.	Weight.	Rate.	Freight.	Advances.	Total.
8 BBls. Whiskey							
10 Large Cs. "			6850				
		Dec. papers attn.					
		*Total Prepaid					
		\$					
Received payment for the Com-		Total					
pany ——— 191—		Prepaid					
Pielow Trans. Co.		To Collect					
Per P. Boyd.		Make Checks Payable to the Com-					
		pany.					

*For use at junction points on freight subject to connecting line settlement.

[48]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge: That the said defendants, to wit, the said Logan Billingsley and the said Fred Billingsley and the said William H. Pielow, and said William Frazier, at the time and place and in the manner and form as in this indictment set out unlawfully and feloniously did conspire, confederate and agree with each other and with the said Charles Young and with the said Jesse Moore Hunt Company and the said Edward P. Baker and the said Harry C. Hunt and with divers and sundry other persons to the grand jurors unknown to commit an offense against the United States of America, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

CLAY ALLEN,

United States Attorney,

WINTER S. MARTIN,

Assitant United States Attorney.

[Endorsed]: Indictment for vio. Act. Feb. 4, 1887, amended by Act of June 29, 1906, entitled "An Act to Regulate Commerce." A True Bill. Henry S. Volkmar, Foreman Grand Jury. Presented to the Court by the Foreman of the Grand Jury in open Court and in the presence of the Grand Jury, and filed in the U. S. District Court. Dec. 22, 1916. Frank L. Crosby. [49]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3500.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY et al.,

Defendants.

Arraignment and Plea.

Now on this 28th day of December, 1916, into open court comes the said defendant Logan Billingsley, for arraignment, accompanied by his counsel Vanderveer & Cummings, and being asked if the name by which he is indicted is his true name, replies it is. Whereupon the reading of the indictment is waived and he here and now enters his plea of guilty to Count I in the indictment. Plea to Count II is postponed at this time. Judgment and sentence continued.

Journal 6, page 30. [50]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3492, No. 3498, No. 3499, No. 3500, No. 3551.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY et al.,

Defendants.

**Motion to Withdraw Pleas of Guilty and Enter Pleas
of Not Guilty.**

Now, on this 19th day of April, defendants Logan Billingsley, Fred Billingsley and Ora Billingsley appear in court with counsel Wm. R. Bell and move to withdraw pleas of guilty heretofore entered, and enter pleas of not guilty, Clarence L. Reams and Clay Allen appearing for the Plaintiff. The motion is argued by respective counsel and motion denied by the Court. Exception is granted. The Government moves for judgment and sentence at this time.

Journal 6, page 147. [51]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3500.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY, FRED BILLINGSLEY
and ORA BILLINGSLEY,

Defendants.

Sentence of Logan Billingsley.

Comes now on this 19th day of April, 1917, the said defendant Logan Billingsley, into open court for sentence, and being informed by the Court of the indictment herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, he nothing says save as he before hath said.

WHEREFORE, by reason of the law and the premises, it is considered, ordered and adjudged by the Court that the defendant is guilty of the crime of violation Act Feb. 4, 1887, as amended by Act of June 29, 1906, and that he be punished by being imprisoned in the United States Penitentiary at McNeil Island, Pierce County, Washington, or in such other place as may be hereafter provided for the imprisonment of offenders against the laws of the United States, for the term of thirteen months, to run concurrently with sentences in Nos. 3492 and

3551, at hard labor, from and after this date. And the said defendant is now hereby ordered into the custody of the United States Marshal to carry this sentence into execution.

Judgment and Decree Book No. 2, page 158.
[52]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3500.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY, FRED BILLINGSLEY
and ORA BILLINGSLEY.

Defendants.

Petition for Writ of Error.

To the Hon. JEREMIAH NETERER, Judge of the
Above-entitled Court:

The above-named defendant, Logan Billingsley, respectfully petitions that a writ of error may be issued wherein and whereby the order and judgment of this Court made and entered herein on the 19th day of April, 1917, denying the motion of the said defendant to be permitted to withdraw his plea of guilty to the indictment herein, and to substitute therefor a plea of not guilty was denied and thereafter sentence was pronounced against the said defendant upon motion of the District Attorney for this district made upon said day, may be reviewed by the Circuit Court of Appeals of the United States

for the Ninth Circuit, and also petition this Court that in the said order allowing said writ of error to issue it be further provided that the judgment and sentence above mentioned be superseded and stayed, and that the said defendant be admitted to bail pending the disposition of the said writ of error by the said Circuit Court of Appeals of the Ninth Circuit.

Respectfully submitted this the 10th day of May, 1917.

WALTER B. ALLEN,
Attorney for Defendant.

[Endorsed]: Petition. Filed in the U. S. District Court, Western District of Washington, Northern Division. May 10, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [53]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3500.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LOGAN BILLINGSLEY and FRED BILLINGS-
LEY and FRED BILLINGSLEY et al.,
Defendants.

Assignment of Errors.

Comes now the above-named defendant, Logan Billingsley, and files the following assignment of er-

rors upon which he will reply in the prosecution of the writ of error in the above-entitled cause:

I.

That the United States District Court for the Western District of Washington, Northern Division, erred in denying the defendant the right to withdraw his plea of guilty.

II.

That the United States District Court in and for the Western District of Washington, Northern Division, erred in refusing to permit the said defendant to withdraw his plea of guilty and to substitute a plea of not guilty.

III.

That the said Court erred in passing the sentence upon the said defendant.

IV.

That the said Court erred in holding that the indictment herein states facts sufficient to constitute an offense under the laws of the United States.

WHEREFORE the said defendant and plaintiff in error prays that the judgment of the said court be reversed, and such directions be given that the alleged errors may be corrected and [54] law and justice done in the matter.

WALTER B. ALLEN,
Attorney for the Defendant and Plaintiff in
Error.

[Endorsed]: Assignment of Error. Filed in the U. S. District Court, Western District of Washington, Northern Division. May 10, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [55]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3,500.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY, FRED BILLINGSLEY
et al.,

Defendants.

Order for Writ of Error.

This, the 10th day of May, 1917, came the defendant, Logan Billingsley, by his attorneys, and filed herein and presented to the Court his petition praying for the allowance of a writ of error intended to be urged by him, praying also that a transcript of the records and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the Court does allow the writ of error, and the same shall act as a supersedeas staying the execution of the sentence imposed herein until the determination by said Circuit Court of Appeals thereof.

JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Order for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. May 12, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [56]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3,492.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY and FRED BILLINGS-
LEY,

Defendants.

No. 3,500.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY and FRED BILLINGS-
LEY,

Defendants.

No. 3,551.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY and FRED BILLINGS-
LEY,

Defendants.

Bail Bond.

KNOW ALL MEN BY THESE PRESENTS: That we, Logan Billingsley and Fred Billingsley, as principals, and Rollin Sanford and E. J. Whitty, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Seven Thousand (\$7,000) Dollars, payment whereof well and truly to be made we bind ourselves and each of us, our heirs, executors and assigns, jointly and severally firmly by these presents.

The condition of the above obligation is such that whereas, in the above-entitled causes in which the United States of America, is plaintiff, and Logan Billingsley and Fred Billingsley, are defendants, a writ of error has been issued to the Circuit Court of Appeals for the Ninth Circuit, from the judgment entered in each of said causes and an order has been entered in each of said [57] causes fixing the amount of the bail bond for the release of the said Logan Billingsley and Fred Billingsley, upon bail pending the determination of said writs of error by said appellate court in the sum of Seven Thousand (\$7,000) Dollars, and the said order is further conditioned that the said bond shall be a joint and several bond and shall serve as a single bond for each of the above causes of action, but in no case shall the sureties hereon be liable in all of the three causes herein taken jointly, in excess of said seven Thousand (\$7,000) Dollars.

Now, therefore, if the said Logan Billingsley and Fred Billingsley, as principal obligors, shall each

and both appear and surrender himself, and themselves, in said above-entitled court, and from time to time thereafter as he or they or either of them may be required to answer any further proceedings, and they and each of them shall obey and perform any judgment or order which may be had or rendered therein in either of the said cases above mentioned, and they and each of them shall abide by and perform any judgment or order which may be rendered in the said United States Circuit Court of Appeals for the Ninth Circuit, and shall not depart from the said district without leave thereof, then this obligation shall be null and void; otherwise of full force and effect.

IN WITNESS WHEREOF, we have set our hands and seals this, the 10th day of May, 1917.

LOGAN BILLINGSLEY.

FRED BILLINGSLEY.

ROLLIN SANFORD.

E. J. WHITTY.

O. K.—ALLEN, U. S. Atty.

JEREMIAH NETERER, Judge.

State of Washington,

County of King,—ss.

Rollin Sanford and E. J. Whitty, being first duly sworn, each for himself and not one for the other, on oath deposes and says: That he is a citizen of the United States [58] over the age of twenty-one years, and a resident of King County, Washington; that he is not an attorney, counselor at law, sheriff or other officer of any court; that he is worth in his own separate property within the State of Washington, over and above all his just debts and liabilities, ex-

clusive of property from sale on execution, the sum of Seven Thousand Dollars.

ROLLIN SANFORD.

E. J. WHITTY.

Subscribed and sworn to before me this 10th day of May, 1917.

[Seal]

R. W. GARDNER,

Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Bail Bond. Filed in the U. S. District Court, Western District of Washington, Northern Division. May 10, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [59]

*United States Circuit Court of Appeals for the
Ninth Circuit.*

No. 3,500.

Writ of Error (Copy).

United States of America,
Ninth Judicial District.

The President of the United States of America, to the
Honorable Judge of the District Court of the
United States for the Western District of Wash-
ington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which was made and entered in the said District Court before you, between the United States of America, as plaintiff, and Logan Billingsley, as defendant, being No. 3,500 of the records of the said District Court in and

for the Western District of Washington, Northern Division, it is concluded a manifest error it is alleged hath happened to the great damage of the said Logan Billingsley, as defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and complete justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all matters concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at Seattle, in said Circuit, within thirty days from the date hereof, the said Circuit Court of Appeals to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

JEREMIAH NETERER,
District Judge. [60]

[Endorsed]: Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. May 12, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [61]

*In the Circuit Court of Appeals of the United States
for the Ninth Circuit.*

No. 3,500.

Citation (Copy).

To the United States of America and to the Hon.
CLAY ALLEN, District Attorney for the West-
ern District of Washington, Northern Division,
GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of Seattle, in said Circuit, on the first day of the September Term, 1917, next, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Logan Billingsley is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. May 12, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [62]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 3,500.

LOGAN BILLINGSLEY et al.,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

**Order Extending Time to July 15, 1917, to File
Record.**

This matter coming on for hearing upon petition of the plaintiffs in error, Logan Billingsley, for an order extending the return time until July 15th,—

IT IS HEREBY ORDERED that the return day upon said Writ of Error be, and the same hereby is extended up to and including the 15th day of July, 1917.

Done in open court this 7th day of June, 1917.

JEREMIAH NETERER,

Judge.

[Endorsed]: Order. Filed in the U. S. District Court, Western Dist of Washington, Northern Division. June 7, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [63]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3,500.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY et al.,

Defendants.

**Order Extending Time to August 1, 1917, to File
Record.**

Upon motion of the defendants herein it appearing to the Court that good cause exists therefor;

It is hereby ordered that the return day in the above numbered cause upon the Writ of Error be, and the same hereby is extended up to and including the 1st day of August, 1917.

JEREMIAH NETERER,

Judge.

Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. July 12, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.
[64]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3,500.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY,

Defendant.

Praeipie for Transcript of Record.

To the Clerk of the Above-Entitled Court:

You will please prepare record on Writ of Error consisting of: Indictment; Plea; Request to Alter Plea and Denial; Sentence; Petition for Writ of Error; Assignment of Errors; Order for Writ; Writ of Error; Citation; Bond; Order Extending Return Writ.

WALTER B. ALLEN.

[Endorsed]: Praeipie. Filed in the U. S. District Court. July 12, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

I waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this Court.

WM. R. BELL,

Attorney for Defendants. [65]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3,500.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY and FRED BILLINGS-
LEY,

Defendants.

Clerk's Certificate to Transcript of Record, etc.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify that the foregoing 65 pages numbered from 1 to 65, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as are necessary to the hearing of said cause on Writ of Error therein in the United States Circuit Court of Appeals for the Ninth Circuit and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to said Writ of Error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiffs in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [66]

Clerk's fee (Sec. 828 R. S. U. S.) for making record, certificate or return, 129 folios at 15¢.....	\$19.35
Certificate of Clerk to transcript of record, 4 folios at 15¢.....	.60
Seal to said Certificate.....	.20
 Total.....	 \$20.15

I hereby certify that the above cost for preparing and certifying record amounting to \$20.15 has been paid to me by Walter B. Allen, Esq., attorney for plaintiffs in error.

I further certify that I hereto attach and herewith transmit the original Writ of Error and original Citation issued in this cause.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 25th day of July, 1917.

[Seal]

FRANK L. CROSBY,
Clerk U. S. District Court.

By Leeta D. Manning,
Deputy. [67]

*United States Circuit Court of Appeals for the
Ninth Circuit.*

3500.

Writ of Error (Original).

United States of America,
Ninth Judicial District.

The President of the United States of America, to
the Honorable Judge of the District Court of the
United States for the Western District of
Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which was
made and entered in the said District Court before
you, between the United States of America, as plain-
tiff, and Logan Billingsley, as defendant, being
No. 3500 of the records of the said District Court in
and for the Western District of Washington, North-
ern Division, it is contended a manifest error it is
alleged hath happened to the great damage of the
said Logan Billingsley, as defendant, as by his com-
plaint appears, we, being willing that error, if any
hath been, should be duly corrected and full and com-
plete justice done to the parties aforesaid in this be-
half, do command you, if judgment be therein given,
that then under your seal, distinctly and openly, you
send the records and proceedings aforesaid, with all
matters concerning the same, to the United States
Circuit Court of Appeals for the Ninth Circuit, to-
gether with this writ, so that you have the same at

Seattle in said Circuit within thirty days from the date hereof, the said Circuit Court of Appeals to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

JEREMIAH NETERER,

District Judge. [68]

[Endorsed]: Original. No. 3500. In the Superior Court of the State of Washington, for the County of King. United States of America, Plaintiff, vs. Logan Billingsley et al., Defendants. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. May 12, 1917. Frank L. Crosby, Clerk. By Ed L. Lakin, Deputy. [69]

*The Circuit Court of Appeals of the United States,
for the Ninth Circuit.*

3500.

Citation (Original).

To the United States of America and to the Hon.
CLAY ALLEN, District Attorney for the
Western District of Washington, Northern
Division, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of Seattle, in said Circuit, on the first day of the September Term 1917, next, pursuant to a

writ of error filed in the Clerk's Office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Logan Billingsley is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

JEREMIAH NETERER,

United States District Judge. [70]

[Endorsed]: Original. No. 3500. In the Superior Court of the State of Washington, for the County of King. United States of America, Plaintiff, vs. Logan Billingsley et al., Defendants. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. May 12, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [71]

[Endorsed]: No. 3023. United States Circuit Court of Appeals for the Ninth Circuit, Logan Billingsley, Plaintiff in Error, v. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed July 28, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*United States District Court, Western District of
Washington, Northern Division.*

No. 3500.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOGAN BILLINGSLEY et al.,

Defendants.

**Order Extending Return Day to and Including
August 1, 1917.**

Upon motion of the defendants herein it appearing to the Court that good cause exists therefor,—

IT IS HEREBY ORDERED that the return day in the above-numbered causes upon the writ of error be, and the same hereby is extended up to and including the 1st day of August, 1917.

JEREMIAH NETERER,

Judge.

[Endorsed]: No. 3500. United States District Court, Western District of Washington, Northern Division. United States of America, Plaintiff, vs. Logan Billingsley et al., Defendants. Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jul. 12, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

No. 3500.

LOGAN BILLINGSLEY et al.,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error,

**Order Extending Return Day to and Including July
15, 1917.**

This matter coming on for hearing upon petition of the plaintiff in error, Logan Billingsley, for an order extending the return time until July the 15th,—

IT IS HEREBY ORDERED that the return day upon said Writ of Error be, and the same hereby is extended up to and including the 15th of July, 1917.

Done in open court this 7th day of June, 1917.

JEREMIAH NETERER,

Judge.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jun. 7, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

No. 3023. United States Circuit Court of Appeals for the Ninth Circuit. Two Orders Under Rule 16 Enlarging Time to July 15, 1917, to File Record thereof and to Docket Case. Filed Jul. 28, 1917. F. D. Monckton, Clerk.

No. 3022

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOGAN BILLINGSLEY and FRED BILLINGSLEY,

Paintiffs in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR FROM THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASH-
INGTON, NORTHERN
DIVISION.

HON. JEREMIAH NETERER, Judge.

Brief of Plaintiffs in Error

WILLIAM R. BELL,

Attorney for Paintiffs in Error.

422 New York Building,
Seattle, Washington.

No. 3022

IN THE
**UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

LOGAN BILLINGSLEY and FRED BILLINGSLEY,

Paintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR FROM THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION.

HON. JEREMIAH NETERER, Judge.

Brief of Plaintiffs in Error

WILLIAM R. BELL,

Attorney for Paintiffs in Error.

422 New York Building,
Seattle, Washington.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOGAN BILLINGSLEY and FRED BILLINGSLEY,

Paintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR FROM THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASH-
INGTON, NORTHERN
DIVISION.

HON. JEREMIAH NETERER, Judge.

Brief of Plaintiffs in Error

STATEMENT OF THE CASE.

The indictment in this case charged the plaintiffs in error, Logan Billingsley and Fred Billingsley, together with other defendants named therein, with a conspiracy to violate Sec. 238 of the Act of Congress of March 4, 1909, Chap. 321, otherwise known

as the Penal Code of the United States relating to the shipment of intoxicating liquors, shipped from one state to another over a common carrier engaged in Interstate Commerce. (Tr. pp. 2 to 13). This indictment was filed in the District Court for the Western District of Washington, Northern Division, on the 21st day of December, 1916, and on the 10th day of January, 1917, the plaintiffs in error were arraigned and entered a plea of guilty to the charge contained in the indictment. The record relating to the arraignments and pleas is as follows: "Now on this 10th day of January 1917, into open court came the defendants, Logan Billingsley, Fred Billingsley and William H. Pielow, for arraignment, and each answered their true names are as above, whereupon the reading of the indictment was waived, and they each enter a plea of guilty to the charge in the indictment herein against them." (Tr. pp. 13 and 14). Thereafter on the 19th day of April, the plaintiffs in error, through counsel, moved the court for leave to withdraw the pleas of guilty theretofore entered, and enter pleas of not guilty, which motion was by the court denied. The record relative to this is as follows: "Now on this 19th day of April defendants, Logan Billingsley, Fred Billingsley and Ora Billingsley, appeared in court with counsel, William R. Bell, and moved to withdraw pleas of guilty heretofore entered, and enter pleas of not guilty;

Clarence L. Reames and Clay Allen appeared for the plaintiff. The motion is argued by respective counsel, and motion denied by the court; exception is granted." (Tr. p. 14). Thereupon the court sentenced the plaintiff in error, Logan Billingsley, to imprisonment in the United States Penitentiary at McNeil's Island for a term of thirteen months, and the plaintiff in error, Fred Billingsley, to a term of six months in the county jail of Whatcom County. (Tr. pp. 15, 16, 17). From the judgment of the court upon a petition regularly filed and presented, a writ of error was granted (Tr. pp. 23, 24 and 25), bringing before this court for review the action of the trial court in refusing to permit plaintiffs in error to withdraw their pleas of guilty entered without the presence or aid of counsel, and enter pleas of not guilty to the crime charged in the indictment.

ASSIGNMENT OF ERRORS.

I.

That the United States District Court for the Western District of Washington, Northern Division, erred in denying the defendants, Logan Billingsley and Fred Billingsley, the right to withdraw their pleas.

II.

That the United States District Court in and for the Western District of Washington, Northern Division, erred in refusing to permit the said defendants to withdraw their pleas of guilty and to substitute pleas of not guilty.

III.

That the said court erred in passing the sentences imposed upon the said defendants.

IV.

That the said court erred in holding that the indictment herein states facts sufficient to constitute an offense under the laws of the United States.

ARGUMENT.

I.

The principal question involved is the right of a defendant who has entered a formal plea of guilty to the charge contained in the indictment to withdraw that plea before sentence has been imposed, and to substitute therefor a plea of not guilty, and be accorded a trial upon the merits. The authorities generally hold that a defendant has the right to withdraw either a plea of guilty at any time before sentence, and, in certain exceptional cases even after judgment has been pronounced, and substitute therefor a plea of not guilty; or has a right to withdraw a plea of not guilty and substitute therefor a plea of guilty at any time before the verdict of the jury has been received and filed. This right, however, under the decisions of the appellate courts of the several states is subject to the discretion of the trial court, which discretion is not absolute and unreviewable, but, on the contrary, is a judicial discretion, and as such subject to review.

Krolage v. People, 224 Ill., 456;

Pope v. State, 56 Fla. 81;

Green v. State, 88 Ark. 290;

Curran v. State, 53 Ore. 154;

State v. Stevenson, 64 W. Va., 392;

Beardon v. State, 79 S. E. Rep. 79, (Ga.).

In *Pope v. State, supra*, the rule adopted by the state courts is well and clearly stated as follows:

“In a criminal prosecution a defendant has a right to plead guilty and the effect of such a plea is to authorize the imposition of the sentence prescribed by law upon a verdict of guilty of the crime sufficiently charged in the indictment or information. The plea should be entirely voluntary by one competent to know the consequences, and should not be induced by fear, misapprehension, persuasion, promises, inadvertance or ignorance. 12 Cyc. 353. While the trial court may exercise discretion in permitting or refusing to permit a plea of guilty to be withdrawn for the purpose of pleading not guilty, yet such discretion is subject to review by an appellate court. A defendant should be permitted to withdraw a plea of guilty given unadvisedly when application therefor is duly made, in good faith, and sustained by proofs, and proper offer is made to go to trial on a plea of not guilty. The law favors trials on the merits, and if the discretion of the trial court is abused in denying leave to withdraw a plea of guilty and go to trial on the merits, the appellate court may interfere.”

In the case of *Krolage v. People, supra*, the defendant when first arraigned on an indictment charging him with embezzlement entered a plea of not guilty; thereafter, at the next term of court, he appeared with counsel and withdrew that plea and entered a plea of guilty. Certain evidence was then introduced and a further hearing of the case

continued. Subsequently, and before sentence, the defendant sought to withdraw the plea of guilty and substitute his original plea of not guilty, which application was denied by the Court. The record on appeal discloses that at the time of the substitution of the plea of guilty the court explained to the defendant that under such a plea it would be the duty of the court to sentence him to the penitentiary, and asked him if he so understood the effect of such a plea, to which inquiry the defendant answered that he so understood the matter, and thereupon the sentence was imposed. In discussing the question the appellate court used the following language:

“It is insisted upon behalf of the defendant that the explanation made by the court was not a compliance with the above requirement of the statute, and in our view of the case that contention must be sustained. The foregoing section of the statute was evidently passed for the purpose of securing to a person charged with crime the right to a trial by jury, unless he should, after an opportunity to fully and fairly understand the consequences of a plea of guilty, waive that right. In a certain sense pleas of guilty in criminal procedure have been discouraged by the courts. In some states pleas of guilty to a charge of murder are not received. In others on a plea of guilty a case must stand continued. *People v. Knoll*, 20 Cal. 164. In still others statutes provide that the court may permit the plea of guilty to be withdrawn at any time before judgment, and such statutes

have been construed to give the defendant an absolute right to withdraw the plea. *State v. Hortman*, 122 Ia. 124. Under our statute the plea of guilty may be entered in all criminal cases, and the court may, in the exercise of a sound legal discretion, if the plea is understandingly made, refuse permission to withdraw it. *Gardner v. People*, 106 Ill. 76. The plea can only be entered after the defendant has been fully advised by the court of his rights and the consequences of his plea. Here there was no attempt whatever on the part of the court to inform the defendant of his rights, or to state the effect of the plea of guilty. The mere inquiry whether he understood that if he pleaded tentiary, and his answering that he did so understand was no explanation whatever on behalf of the court. The length of time which he might be sentenced and serve in the penitentiary, and his right to trial by jury if he entered the plea of not guilty, were left entirely to his own knowledge and information, unexplained by the court. * * * The withdrawal of the plea of guilty should not be denied in any case where it is evident that the ends of justice will be subserved by permitting the plea of not guilty to stand in its stead. 'The least surprise or influence causing him to plead guilty when he had any defense at all should be sufficient cause to permit a change of the plea from guilty to not guilty'. *State v. Williams*, 35 La. Annual 1357. *State v. Coston*, 113 La. 1717. 'As the plea of guilty is often made because the defendant supposes that he will thereby receive some favor of the court in the sentence, it is the Eng-

lish practice not to receive such pleas unless it is persisted in by the defendant after being informed that such plea will make no alteration in the punishment. 1 Archbold on Criminal Practice and Pleading, 18 Ed. 334. And, by analogy we think the defendant should be permitted to withdraw his plea of guilty when unadvisedly given, when any reasonable ground is offered for going to the jury. This is a matter within the discretion of the court, but a judicial discretion which should always be exercised in favor of innocence and liberty. The courts should so administer the law and construe the rules of practice as to secure a hearing upon the merits if possible. *Gauldin v. Crawford*, 30 Ga. 674. The law favors a trial on the merits by a jury.' *Deloach v. State*, 77 Miss. 691."

In *Beardon v. State*, *supra*, the rule is broadly stated as follows:

"The law provides a different means for avoiding the consequences of a plea of guilty. A defendant may withdraw his plea of guilty as a matter of right before sentence is imposed, and he may withdraw his plea after sentence has been imposed, if for any meritorious reason it addresses itself to the sound discretion of the trial court. If there is any valid and sufficient reason why the defendant should be permitted to withdraw his plea after sentence in order to prevent injustice, the failure of the court to exercise its discretion in favor of the withdrawal of the plea is an abuse of discretion."

See also *State v. Hortman*, 122 Ia., 124.

1 Remington & Ball. Code of Washington, Sec. 2111.

It is a general rule established and enforced by every appellate court which has had occasion to deal with this question, if a defendant, when arraigned seeks to introduce a plea of guilty to the charge lodged against him, he must be appraised by the trial judge of the effect of such a plea, and the consequences which will follow if the plea is received; and if this is not done, a refusal to permit the withdrawal of the plea and to substitute a plea of not guilty before judgment is an abuse of discretion. And this is true whether or not there is a guiding and controlling statute on the subject. In the federal courts the practice of the English Courts on the subject is more strictly adhered to, and consequently the rights of a defendant in a criminal case more jealously safe guarded. A plea of guilty is here regarded, and properly so, as a confession, and the confession, whether made formally in court, or informally out of court, is never received as evidence of defendant's guilt, unless he be first warned clearly and fully of its effect and consequences.

In 5 Ency. of the United States Supreme Court Reports, page 108, the rule is briefly stated:

*“A plea of not guilty after plea of guilty.—*When the accused is arraigned and pleads guilty or confesses the indictment, it is usual for the court to refuse to record such plea or confession, but admit him to plead not guilty.”

In the case of *Hallinger v. Davis*, 146 U. S. 314, the proper course in such cases is clearly indicated. The defendant when first arraigned pleaded guilty to the indictment, but the court refused to accept the plea, and ordered it to be held in abeyance subject to the defendant's consultation with counsel, who was then assigned to him for the purpose of consultation concerning such plea. Some days later the defendant and his counsel again appeared and insisted on said plea of guilty, whereupon the court continued said assignment of counsel, and continued the cause until a later date, and then on the arrival of that date, and not until then, was the plea of guilty accepted and acted upon.

In *Bram v. U. S.*, 168 U. S. 532, 545, a leading criminal case in this country, the correct procedure is clearly indicated. In the opinion in that case, quoting from the early English authorities, it is said:

“In Hawkins Pleas of the Crown (6th Ed. by Leach, published in 1787) Book 2, Chap. 31, it is said, Sec. 2: ‘Where a person upon his arraignment actually confesses he is guilty or unadvisedly disclosed the special manner of the fact, supposing that it doth not amount to felony where it doth, yet the judges upon proper circumstances that such confession may proceed from fear, menace or duress, or from weakness or ignorance, may refuse to record such confession, and suffer the party to plead

not guilty. In the second volume (Lord Hale's Pleas of the Crown) at page 225 it is said: 'A confession is either simple or relative in order to the attainment of some other advantage; that which I call a simple confession is where the defendant upon hearing of his indictment, without any other respect confesseth it, this is a confession, but it is usual for the court, specially if it be out of clergy to advise the party to plead and put himself upon trial, and not presently to record his confession, but to admit him to plead.' 27 Assiz. 40. If it debut an extra judicial confession, although it be in court, as where the person freely tells the fact and demands the opinion of the court whether it be felony, though upon the fact thus shown it appeared to be felony, the court will not record his confession, but admit him to plead to the felony not guilty."

In the present case the record discloses that the plaintiffs in error appeared without counsel, and were arraigned and called upon instantly to plead to the indictment herein. It discloses further, that the court before receiving their pleas of guilty failed to explain to them their right to a trial on the merits before a jury, and neglected to inform them of the effect of such a plea, and the consequences which must follow, if the same were accepted by the court. As the record briefly shows, the arraignments took place on the 10th day of January, 1917, and the plea of guilty accepted and entered immediately thereafter. The sentence, however, for some pur-

pose, not disclosed by the record, was not imposed until the 19th day of April following. In the meantime plaintiffs in error asked leave to withdraw their original plea and enter a plea of not guilty, which petition was denied. In the face of the record before this court this was a clear abuse of discretion. In the first instance the court should have refused to accept the plea of guilty until after the plaintiffs in error had been assigned counsel to consult with them regarding their proffered plea, and, in any event, should have refused to receive such a plea until he had clearly impressed upon them the effect and consequences which would necessarily flow from its reception. Absolutely nothing was done by the court to appraise the plaintiffs in error of their constitutional rights, or to safe guard their liberties. On the contrary when they had in some way become apprized of their rights in the premises, and before their plea of guilty had been acted upon, he refused to permit such pleas to be withdrawn, and prevented them from having their constitutional right of a trial by jury on the merits of the charge contained in the indictment.

II.

If the indictment to which the plaintiffs in error pled guilty did not state facts sufficient to consti-

tute an offense under the laws of the United States, then it was error to impose sentence upon them. This indictment charged a violation of Sec. 238 of the Penal Code of the United States; this section is as follows:

“Any officer, agent or employee of any railroad company, express company or other common carrier who shall knowingly deliver or cause to be delivered to any person, other than the person to whom it has been consigned, unless upon the written order in each instance of a bona fide consignee, or to any fictitious person, or to any person under a fictitious name, any spiritous, vinous, malted, fermented or other intoxicating liquor of any kind which has been shipped from one state, territory or district of the United States or place non contiguous to but subject to the jurisdiction, or into any other state, territory or district of the United States or place non contiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory or district of the United States or place non contiguous to but subject to the jurisdiction thereof, shall be fined not more than \$5,000, nor imprisonment not more than two years or both.”

The indictment in this case does not allege, or attempt to allege, that the plaintiffs in error were, or that they had been at any time officers, agents or employees of any railroad company or other common carrier engaged in Interstate Commerce, consequently they could not be guilty of a violation of

the penal section just above quoted, and upon which the indictment herein was based.

We submit that the lower court erred, and that this cause should be reversed and remanded with instructions to quash the indictment herein and discharge the plaintiffs in error from custody, or at least that the cause be reversed and remanded with instructions to permit the withdrawal of their pleas of guilty and the substitution of their proffered plea of not guilty to the indictment.

Respectfully submitted,

WILLIAM R. BELL,
Attorney for Plaintiffs in Error.

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Seattle, Washington.

No. 3022

No. 3023

No. 3024

**UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

LOGAN BILLINGSLEY and FRED BILLINGSLEY,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

**UPON WRIT OF ERROR TO THE UNITED
STATE DISTRICT COURT FOR THE
WESTER DISTRICT OF WASH-
INGTON, NORTHERN DIVISION**

Plaintiffs in Error's Petition for Rehearing

WILLIAM R. BELL,

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300 Central Building,

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**UNITED STATES
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UPON WRIT OF ERROR TO THE UNITED
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INGTON, NORTHERN DIVISION

Plaintiffs in Error's Petition for Rehearing

TO THE HONORABLE JUDGES OF THE
UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE NINTH CIRCUIT:

The petition of plaintiffs in Error, Logan and
Fred Billingsley, for a rehearing of said cause,

showeth unto your honors that, being aggrieved by the decision and judgment in this cause entered on the 5th day of March, A. D. 1918, wherein and whereby the judgment of conviction and sentence heretofore entered in the United States District Court for the Western District of Washington in the Northern Division in said cause, as appears from the transcript of the record in the above entitled cause and court, was affirmed;

And whereas your petitioners herein, earnestly believing that error has been committed in affirming said judgment of conviction in this, to-wit: That as hereinbefore alleged and asserted in the assignment of errors, viz: (fourth assignment of error)

“That the said Court erred in holding that the indictment herein states facts sufficient to constitute an offense under the laws of the United States.”

This Court has likewise erred in that the said indictment is insufficient in law for these reasons.

The statute under which the indictment was returned contemplates the doing of certain acts by persons over whom Congress had control, to-wit: the officers, agents and employees of an interstate carrier, or a state carrier while engaged in interstate carriage, and the indictment nowhere charges

that such an officer, agent or employee entered into the conspiracy charged. In view of the limitation on the Congress to punish intrastate carriers not engaged in interstate commerce it is not enough to charge the purpose of the conspiracy in the language of the statute. From aught that appears in the conspiracy charge or in the overt acts which follow, the common carriers mentioned may have been engaged in business solely as intrastate carriers, control over whom was solely within the power of the state. A careful analysis of the indictment at bar when the limitations of Congress in regulating the conduct of the carrier in interstate commerce is considered will as your petitioners humbly believe disclose the defects complained of in the indictment.

Wherefore your petitioners pray that your honors will grant a rehearing in said cause and after due consideration reverse the decision and judgment heretofore entered and enter an order dismissing said prosecution.

WILLIAM R. BELL,
Attorney for Plaintiffs in Error.

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING

Is Section 238 of the Penal Code sufficiently comprehensive as to embody all of the elements of the offense which it seeks to create and control as to permit the pleader to set forth and describe the object of the conspiracy by adhering to the general language of the statute?

Looking to the statute we find it must rest upon the jurisdiction of the federal courts over interstate commerce. Congress cannot assert jurisdiction or control over a common carrier who plays no part in interstate commerce. Sections 238 239 and 240 create offenses unknown to the law prior to the passage of the Penal Code in 1909. Many abuses had developed in the handling of interstate shipments of liquor which led to the enactment of these three sections.

Prior to the Wilson Act and before *Leisy v. Hardin*, 135 U. S. 100, 34 L. Ed. 128, intoxicating liquors had been considered and dealt with as any other articles of commerce and merchandise. This case laid down the rule that the sale of an article in the unbroken package upon arrival at its destination in the state is an incident to the right to transport merchandise in interstate com-

merce. This case definitely fixed for the time being the dividing line between the right of the government to control shipments in interstate commerce, and the rights of the state after governmental control had ceased.

Then Congress passed the Wilson Act, Aug. 8, 1890, 26 Stats. 313, for the purpose of depriving interstate shipment of liquors of the protection they had received under *Leisy v. Hardin* and to subject them to the law of the State regulating intoxicating liquors.

State authorities believing that the phrase in the Wilson Act "on arrival in the state" extended state control over shipments of liquor in interstate commerce when they had crossed the state line, prosecuted Rhodes the station agent of a railroad company, who had received a shipment of liquor and had taken it from the train and placed it in a nearby warehouse of the railroad company to await the time when the consignee should call for it and take it away. This case—*Rhodes v. Iowa*, 170 U. S. 412, 42 L. Ed. 1088—held that the shipment was protected from state interference until it reached the hands of the consignee. This decision defined the scope of the Wilson Act.

In the earlier case of *Bowman v. Chicago and*

N. W. Railway Co., 125 U. S. 465, 31 L. Ed. 700, it was held that interstate shipments were protected from the operation of state laws from the moment of shipment to the delivery of the goods to the consignee at the place of destination. *Leisy v. Hardin supra* merely extended federal protection up to the time of sale after the shipment had reached destination and *Rhodes v. Iowa* dealt with the Wilson Act and its effect upon the interstate shipment of liquors. The net result of these decisions was to establish the rule that liquor shipments were within the control of Congress until delivery to the consignee.

The Wilson law partially removed the protection afforded these shipments by interstate commerce and the Webb Kenyon Act, Mar. 1, 1913, 37 Stats. 699, entirely removed it. Neither of these acts dealt with the shipment of liquor in such a way as to abolish its interstate character per se. These two acts did but deprive the shipment of the immunity it would otherwise have, as a subject of interstate commerce control by the National Government. These three decisions, together with many others mark and define the limits of Federal control. This was the situation when Congress passed the three sections of the Penal Code one of which is the basis of the indictment at bar.

The Courts have in several cases considered these sections and have thought it proper to interpret them in the light of conditions existing before their passage and the purpose they sought to accomplish.

In *U. S. v. 87 Barrels of Wine, etc.*, 180 Fed. 215, the District Court of Vermont had before it a libel of information brought by the government to condemn certain barrels of wine, under Sec. 240 of the Penal Code upon the ground that they were improperly labeled. The Court in attempting to ascertain the purpose of these several sections to see whether they applied to the case before it, took up their history. It said that they were new, not only in words but in treatment of the subject matter and their history could appropriately be considered in order to ascertain something of Congressional intent. The Court then states as follows:

"The history of legislation shows plainly that the object of the promoters of the bill was to restrict common carriers to the business of transportation only, so far as liquor is concerned, and to produce on the records of the delivering carrier evidence procurable by lawful subpoena of the identity of the recipient of any package containing liquor, which last result was thought to be attained by the requirement of section 238 that delivery should be made only to the consignee 'unless upon the

written order in each instance of the bona fide consignee,' and by the further requirement of section 240 that any package delivered should bear upon it a description of the kind and quantity of its contents and 'the name of the consignee.' "

The Court then considers the sense in which the term consignee is used in the statute. It refers to the codes of several states and to the common law for a definition and decided that the consignee is the person to whom goods are shipped, consigned or otherwise transmitted. It said that "the deliverer may or may not be the owner; he may be a mere bailee gratuitous or otherwise, the vendee, the commission merchant or a mere agent of the shipper. He may even be a swindler, who had deceived the shipper or consignor into sending him goods to which he could assert no legal or equitable title or interest whatever," and finally decided that the carload of wine was properly marked and labeled within the evident meaning of Section 240.

In *Witte v. Shelton*, 240 Fed. 265, the Circuit Court of Appeals for the Eighth Circuit held that Section 238, which makes it an offense for an agent of a common carrier to deliver liquor shipped in Interstate Commerce to a fictitious person, was not impliedly repealed by the Webb Kenyon Act

of March 1st, 1913, 37 Statutes 699. The Court say, in referring to the Webb-Kenyon Act, that

“the latter act contains no provision repugnant to the former act, no provision indicating any intention of the members of Congress thereby to repeal or strike down the denunciations of delivery by agents or officers of the common carrier of liquor in Interstate Commerce to persons under fictitious names or to permit them so to do.”

In *U. S. v. The First National Bank of Anamoose*, 195 Fed. 336, the District Court dealt at length with the history of these three sections and concluded that the banker who collected a draft attached to a bill of lading for intoxicating liquor had violated Section 239 in that his act of collecting the purchase price under those circumstances was “in connection with the transportation of any spirituous * * * or other intoxicating liquor of any kind.”

In the same case in the Circuit Court of Appeals, to-wit: *First National Bank of Anamoose v. U. S.*, 206 Fed. 374, the Lower Court was overruled in rather a critical opinion. The court of appeals lays great stress upon the phrase “or any other person,” as meaning any other person of a similar kind or character as those theretofore described, to-wit: railroad company, express company, or other common carrier. The Court applies the rule of

ejusdem generis and holds that the statute could not be intended to include the banker who collected the draft.

Danciger v. Stone, 188 Fed. 510, arrived at a like conclusion in an attempt by the prosecution to subject the banker to the operation of Sec. 239. In this opinion the Court quotes from the report of the Congressional committee relative to this legislation, while the same was pending in Congress, which is as follows:

“The principal cause of difficulty in restricting the liquor traffic in the states prohibiting such traffic, has been the misuse of the facilities furnished by railroad companies, express companies, and other common carriers in bringing in liquors from outside states to be paid for on delivery. To meet this evil, your committee report the substitute.

“By the proposed substitute, if it be enacted into law, Congress will, under its constitutional authority, bring its power to bear directly upon the common carriers, prohibiting them from acting as agents of the vendors of liquors in other states. Further, by requiring that all interstate shipments of liquors shall be plainly marked as to their contents, the substitute hereby submitted will enable the several states to trace and to control the disposition and use of such liquors under their own police powers.”

These cases clearly show that Sec. 238 can only refer to a common carrier who is engaged in Inter-

state Commerce before delivery to the consignee in the state of destination.

In *Rosenburg v. Pacific Express Company*, 241 U. S. 248, 60 L. Ed. 880, the court held that the State statute would not be permitted to prohibit or interfere with shipments of liquor into a state. This case arose before Sec. 238 was passed but serves to show the condition of the law prior to the passage of the section, all of which clearly shows the purpose and limited scope of 238 as passed.

It is likewise well settled in the Federal Courts that a state common carrier may or may not be an Interstate carrier depending upon his employment in the particular case. Connecting carriers who furnish connecting transportation for freight shipments in Interstate Commerce are Interstate carriers, while transporting merchandise in Interstate Commerce from one connecting Interstate carrier to the lines or dock of another. The shipment in each instance must be looked to in order to determine its status.

In the present case in view of the history of Sec. 238 and the purpose which it attempts to serve, it is quite apparent that Congress intended to deal with the officers, agents or employees of common carriers who lent themselves to the subterfuge of

delivering an Interstate shipment of liquor to a fictitious consignee. It was aimed at the officers of the carrier while they were still performing an Interstate function before delivering to the consignee. If the court is right in the case of *U. S. vs. 82 barrels of wine, supra*, the term consignee means a person to whom it is billed without regard to the true owner of the same or the person for whom it may be ultimately intended. This construction is borne out by *Rhodes vs. Iowa, supra*. Looking to the statute, it is observed that it first refers to the "person to whom the liquor has been consigned." Then follows the qualification found in the word "unless," to-wit: "Upon the written order in each instance of the bona fide consignee." It then takes up fictitious persons as a class and persons under fictitious names as another class, but the clear purpose is to require delivery in the first instance by the Interstate carrier and its officers to the record consignee. It requires that they shall not knowingly and with criminal purpose deliver to a fictitious consignee or to a person under a fictitious name, in order that a shipment of intoxicating liquor in Interstate Commerce may be published to the world, thereby enabling the State officers to take advantage of the true facts relating to the shipment for the purpose of enforcing the state law. With this in mind, it is clear that

the only persons covered are those officers or agents of Interstate carriers who may violate the section.

Let us see whether the indictment in this case clearly sets out the purpose to charge defendants with conspiracy to violate this section. It is fundamental in law that one of these persons must belong to the class of persons enumerated in the Act because the Act in dealing with the consummated offense covers only these officers, as a class. It reaches the conduct of a limited class of persons only.

It nowhere charges in this indictment that the transfer companies mentioned of whom certain of their officers or employees were defendants, were common carriers in Interstate Commerce. The first paragraph of the indictment covers in descriptive terms the status of the defendant William H. Pielow and the Pielow Special Delivery Transfer Company. It states in this descriptive paragraph "that during all the times herein mentioned, said Pielow Special Delivery & Transfer Company was a common carrier engaged in the business as such at said Seattle," *AND AMONG OTHER THINGS* handled, carried and transferred Interstate shipments of merchandise in connection with divers and sundry lines of railway and steamship companies

doing an Interstate common carrier business at Seattle in freight and other items of merchandise. A clear distinction is made between the Interstate railway and steamship lines and the particular common carrier mentioned. It is alleged to be engaged in business at Seattle as a common carrier and the only function it performs is to sometimes act as a connecting link in an Interstate shipment. Note the language "*and among other things handled, etc.*" showing that it was only a part of its business to handle Interstate shipments. It is clearly a state common carrier who sometimes handles Interstate shipments. It is not engaged in daily business as an interstate carrier.

Then follows a statement that William H. Pielow was one of its officers and agents. The same statement is made about the Lloyd Transfer Company of whom William Frasier was an employee. The same statement is made about William Frasier and Logan Billingsley in speaking of their connection with the Frasier Transfer Co. These two last paragraphs contain the statement that the particular circumstances of employment were unknown to the grand jurors.

These preliminary paragraphs are couched in general terms and are pleaded as matters of induce-

ment to the more important and specific allegations which follow.

Coming then to the charging part of the indictment, after the common confederacy clause it is said that they conspired to commit an offense against the United States, to-wit: Sec. 238 of the Penal Code, in this, that it was the purpose, plan, and object of said conspiracy and of the said conspirators and each of them that an officer, agent and employee of a common carrier should knowingly deliver and cause to be delivered to a person other than the person to whom spirituous, malt and intoxicating liquors had been consigned, etc., and then and therefore consigned to divers persons in Washington and Alaska.

Stopping at this point a fatal ambiguity is disclosed in the language "consigned to divers persons in Washington and Alaska" for this reason; if the shipment was consigned to a point in Washington and the descriptive matter concerning the transfer men show that they were engaged in business at Seattle, sometimes as local carriers and sometimes as interstate carriers, then there is nothing to disclose that the purpose was to carry out the conspiracy while one of the conspirators was serving as an officer or employee of a common carrier then and there engaged in Interstate Commerce. The shipment to Seattle, Washington, would not establish

these common carriers mentioned as Interstate carriers because the destination of the liquor was Seattle and they in turn would act merely as the agent of the consignee. The indictment to be good in this respect must charge that one of these men was then and there in the employ of the railroad company, an interstate agency, and being such officer or employee then and there delivered the liquor to the consignee whom he then and there knew to be receiving the same under a fictitious name. With the ambiguity referred to in the language of the indictment if you say that the purpose was to ship the liquor in Interstate Commerce to Alaska and thereby to use one of these transfer companies as a connecting carrier in Interstate Commerce, the indictment should clearly cover such a situation and show beyond any doubt that it was the intention of the conspirators to conspire with Pielow or Frasier as employees of an Interstate connecting carrier while they were serving in that capacity. The mere fact that these men in the local transfer companies sometimes did an Interstate business does not justify the pleader in predicating the offense upon a fixed and continued status of Interstate carrier employment.

Note that the further language of the indictment to which we are about to call the court's attention must be read into and limit the preceding paragraph. It is said that an officer and agent of a

common carrier, without mentioning what kind of a carrier, should cause to be delivered certain liquors to divers and sundry fictitious persons in Washington and Alaska which had theretofore been carried from California to Washington. There is no charge that it was a continuous shipment or that these men were to do these acts while working for or representing the Interstate carrier, or performing any function whatsoever of an interstate character. From all that appears liquor might have been shipped into Washington as one independent transaction and the same liquor reshipped from Washington to Alaska as another, in which event these men would not be Interstate carriers at all. And the language of the indictment which attempts to set out the scope and object of the conspiracy is limited by a videlicet at the bottom of page five in the record as follows:

“That is to say, that it was the plan and object of said conspiracy and of said conspirators and each of them that the defendants Frazier and Pielow as officers, agents and employees of common carriers, as hereinbefore alleged, and while acting in their said capacity, should wilfully, knowingly and feloniously and unlawfully deliver and cause spirituous malt and intoxicating liquors to be delivered to persons other than the true consignee without then and there having a written order of delivery from the bona fide consignee, and to deliver spirituous and intoxicating liquors to divers and sundry

fictitious persons, and to divers and sundry persons under fictitious names, at said Seattle, which said liquor had theretofore been shipped from California to Washington by the said Jesse Moore Hunt Company, and the said Edward P. Baker and Harry C. Hunt, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

Here it will be observed is a frank admission in the indictment that it was the purpose of the conspirators to ship from California and deliver these spirituous and intoxicating liquors to divers and sundry fictitious persons and to divers and sundry persons under fictitious names at Seattle. In view of this specification in the indictment under a *vide licit* and in view of the ambiguity of the language in the preceding paragraph and in view of the use of the term common carrier without any allegation of the Interstate character of the carrier, does not the indictment, in alleging and setting out the purpose and object of the conspiracy, charge a purpose to ship liquor from San Francisco to Seattle, Washington, without any allegation of the interstate character of the common carrier employed. Is there any allegation that the agent or employee charged as being a member of the conspiracy was then and there while the conspiracy was in progress an officer or employee of an interstate carrier, other

than the general allegation in the descriptive paragraphs before the charging part, to the effect that these local transfer companies to whom several of the defendants are alleged to belong *among other things*, which is equivalent to saying *sometimes, engaged* in business as a common carrier in Interstate Commerce at Seattle? Is there anything to show that the conspiracy was one contemplating a certain participation therein by an officer or employee of an interstate carrier?

Coming to the overt acts, it will be seen that none of these charges show a shipment of liquor to Seattle wherein the local transfer company mentioned, whose officers or agents were members of the conspiracy, played any part in the Interstate carriage of the shipment. It is clear upon its face when you look to these overt acts that the Interstate character of the employment had ceased when the shipment of liquor was received by the local transfer company as the agent of the consignee. While these acts are condemned and would undoubtedly have constituted an offense if one of the defendants had been in the employ of a railroad or express company, who was an interstate carrier, yet in the absence of this employment no offense is stated.

Looking to the overt acts, the first one charges that William Pielow did take into his possession a cask of whiskey consigned to the Raymer Pharm-

acy which was named as the consignee. It is apparent that he and his transfer company became the agent of the Raymer Pharmacy. Under *Rhodes vs. Iowa, supra*, the protection of Interstate Commerce ceases and the delivery was at end when made to the consignee, to-wit: Raymer Pharmacy, fictitious or otherwise as the case may be. Nothing wrong in this overt act is shown unless at that time Pielow was an employee of an Interstate carrier or one of his associates in the conspiracy was so employed and there is nothing in the indictment upon which such a contention can be based or predicated.

The second overt act charges the receipt of a barrel of whiskey consigned to Raymer Pharmacy upon another date by the same defendant.

The third overt act charges that Frasier did receive and take into his possession two barrels of liquor from the Oregon-Washington Railway & Navigation Company, which liquor was then and there consigned to a fictitious consignee, to-wit: Ket Pharmacy, the said two barrels of whiskey having been shipped and transferred from California to Seattle in the state of Washington. Defendant was undoubtedly liable to the State law when he presented himself to the railroad company for this liquor but unless he was then and there conspiring with an officer of the railroad company or other

Interstate agent, he was not guilty of any offense. The same may be said of the fourth overt act which merely charges that William Frasier did receive and take into his possession two barrels of whiskey from the Wells-Fargo Company, a common carrier.

The fifth overt act charges that William Frasier as an employee of the Lloyd Transfer Company did receive into his possession three barrels of whiskey then and there consigned to a fictitious consignee, to-wit: Arket Pharmacy, which was theretofore shipped from San Francisco to Seattle.

In the sixth overt act it was charged that Pielow received three barrels of whiskey from the Wells-Fargo Company then and there consigned to the same fictitious consignee.

The seventh overt act charges Pielow as receiving and taking into his custody three barrels of whiskey from the Wells-Fargo Company.

The remaining overt acts relate to certain messages and telegrams which were sent from Seattle. There is no charge in any one of these overt acts that the liquor was held to be forwarded to Alaska or that it was then and there in transit in Interstate Commerce or that any one of the defendants was then and there an officer of a transfer company which was transporting this merchandise in Inter-

state Commerce, but on the contrary it clearly appears that these local transfer companies were acting as agents of the consignee in hauling the liquor from the terminal of the interstate carrier to the consignee's place of business. The shipments were not billed to the local transfer company as a connecting carrier for delivery to the consignee. At least there is no allegation to that effect.

The overt acts set forth do not show in any manner how the conspiracy was to be carried out. In fact, analyzing them they negative the idea of any conspiracy in which one of their number was employed as an officer or employee of an Interstate carrier. In each one of these overt acts the local transfer company merely acted as the agent of a consignee. The interstate character of the shipment and its Federal control had ceased in *Rhodes vs. Iowa*, when delivery was had to the consignee. The local company played no part in the Interstate function and the only allegation which touches upon the interstate character of the local transfer company is found in the descriptive matter before the charging part of the indictment in which it is stated that among other things these companies did interstate work. When language so loose and general is employed merely by way of inducement, the court should fall back upon its knowledge of the functions

of the local transfer company. We very well know that they may be engaged for weeks at a time in handling intrastate shipments carrying them from the railroad or dock to the merchant's warehouse, then for several days they may be engaged entirely in transfer work from railroad terminal to the steamship company wharf thereby taking part, as a connecting carrier, in a through shipment. The allegation that they do this class of work among other things, is equivalent to saying that they sometimes do it and with this as the preliminary statement of a specific employment of the defendant, you have the allegation that it was the purpose of the conspiracy that an employee of a common carrier should cause to be delivered to fictitious persons intoxicating liquors billed to Washington as well as to Alaska.

This ambiguity is fatal when you consider the *vide licit* which is imposed upon the general language which shows that the specific purpose was to ship to Seattle, Washington. In view of these considerations the indictment as a whole, with all due respect to the court, does not show that any one of the conspirators was an officer, agent or employee of an Interstate carrier and we respectfully submit that the relation once fixed would have to continue up to and at the time the overt acts were committed. It will not do to say that now and then certain of these defendants were employed by local transfer

companies who occasionally did an interstate business and then follow it by a videlicet showing the clear purpose of the conspiracy to confine the shipments to Seattle and to deliver to local consignees wherein the transfer company took no part in the interstate carriage. If it were shown anywhere in this indictment that overt acts were committed in this jurisdiction while one of the defendants was an officer, agent or employee of an interstate carrier, the conspiracy contemplated under Section 37 of the Penal Code would be complete. As it is, the indictment does not state facts to constitute an offense.

Mere descriptive matter in an indictment preliminary to the charging part cannot control the videlicet which accurately designates the conspiracy as one to ship liquor to Seattle in which none of the members of the conspiracy on the face of the indictment was to take part as an employee of an interstate carrier. The overt acts instead of showing that a conspiracy was to be executed, furthered and carried out by them, show on the contrary a participation in the final receipt of the liquor from the carrier at the point of destination in the state, as the local agent of the consignee. The interstate character of shipment ceased upon the arrival of the liquor at destination from aught that appears in

the overt acts. These overt acts cannot in any sense be said to have been done or committed in pursuance of the conspiracy. No conspiring is charged when you consider the true meaning of Sec. 238. And no overt act is charged which would in any manner effectuate same.

It is said in the opinion filed in this Court that this being an indictment for conspiracy the allegations respecting the Billingsleys are sufficient, intimating that such would not be so in an indictment charging the consummated offense. We respectfully submit that even conspiracy indictments must conform to the well-established rules of pleading requiring such certainty as to accurately describe the offense and apprise the accused of the crime which he stands charged. Every ingredient of which the offense is composed must be accurately and clearly alleged and these rules are applied to conspiracy indictments as well as to those charging the consummated offense.

For a conspiracy indictment which was tested by these rules see *U. S. vs. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588. This indictment had to do with a conspiracy charging a purpose on the part of the defendants to deprive certain persons of their civil rights guaranteed under the Constitution. A vague

and indefinite statement in the indictments was made without any specification of the rights or privileges which had been violated or invaded. The Court say:

“Vague and indefinite allegations of the kind are not sufficient to inform the accused in a criminal prosecution of the nature and cause of the accusation against him within the meaning of the sixth amendment of the constitution.”

In another count in the same indictment the pleader went further and charged the defendants with conspiring to intimidate and threaten certain colored persons in the free exercise and enjoyment of the right and privilege to vote at any election to be thereafter had, the defendants well knowing that these persons were entitled to vote. In this count the particular right which the defendants conspired to deprive these persons of, was the right to vote and it was well set out. The Courts say:

“But the difficulty in the count is that it does not allege for what purpose the election or elections were to be ordered, nor when or where the elections were to be had and held.”

Another typical case illustrative of our position in this case is that of *Pettibone vs. U. S.*, 148 U. S. 197, 37 L. Ed. 419. This is also a conspiracy indictment which was quashed in the United States

Supreme Court for uncertainty, ambiguity and vagueness.

The conspiracy charge will not be aided by the allegations in the overt act.

In *Joplin Mercantile Co. vs. U. S.*, 326 U. S. 531, 59 L. Ed 705 the distinction between interstate and intrastate commerce is carefully made and the language of the indictment is examined very critically for this purpose. The same critical analysis of the present indictment will show its weakness. Finally we urge the familiar rule that where the allegations of the indictment leave it open to doubt whether a conspiracy to ship liquor in interstate commerce is charged or whether it shows a purpose to make a shipment which ended at Seattle leaving the local transfer companies in the position of intrastate officials this doubt must be resolved in favor of the defendants. The language in that portion of the indictment which attempts to state the object of the conspiracy wherein it is said they intended to ship to Washington and Alaska followed by the *vide* *licet* referred to, leaves the construction of the indictment in so much doubt as to entitle the defendants to the benefit of this doubt which the law gives them. A long line of cases establish the rule that the indictment must be construed against the pleader

and in favor of the defendant where it is ambiguous or open to any doubt.

See *Williamson vs. U. S.*, 207 U. S. 425, 52 L. Ed. 278.

We respectfully submit that the cause should be reversed.

WILLIAM R. BELL,
Attorney for Plaintiffs in Error.

No. 3022

No. 3023

No. 3024

United States Circuit Court of Appeals For the Ninth Circuit

LOGAN BILLINGSLEY and
FRED BILLINGSLEY,

Plaintiffs in Error,

vs.

THE UNITED STATES OF
AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN
DIVISION.

Brief of Defendant in Error

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No. 3022
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UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR
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DIVISION.

Brief of Defendant in Error

MOTION TO DISMISS

Comes now the United States of America, defendant in error herein, by its counsel, and moves the court for dismissal of cause No. 3022, 3023 and

3024, and each of them, for the reason that the plaintiffs in error and their counsel have failed, neglected and refused to file with the Clerk of this court twenty copies of a printed brief and have failed, neglected and refused to serve upon counsel for defendant in error a copy of said brief at a date further removed than fifteen days prior to said hearing.

ARGUMENT ON MOTION

Causes No. 3022, No. 3023 and No. 3024 were originally assigned for argument in this court on September 19, 1917, at Seattle, Washington.

Rule 24, Sec. 1, provides:

“The counsel for the plaintiff in error or appellant shall file with the clerk of this court twenty copies of a printed brief, and serve upon counsel for the defendant in error or the appellee one copy thereof, at least fifteen days before the case is called for argument.”

No briefs were served upon counsel for defendant in error and none filed with the court prior to that date. Counsel for plaintiff in error, William R. Bell, then appeared before the court and asked for further assignment of the cases at a later date, giving as a reason his inability to prepare his briefs

due to the press of other business. Counsel for the Government, while not consenting, suggested to the court his unwillingness to object to the request of plaintiffs' counsel if the cause could be assigned to such date as would not impose cost upon the government. The cases were then tentatively assigned by the court for October 5, 1917, and prior thereto, upon its own motion definitely assigned for October 9, 1917, at San Francisco, at which date other causes from this district were to be heard. At the time of continuance counsel for plaintiff in error assured counsel for the Government that briefs herein would be served not later than September 25, 1917. At date of writing this brief no service has been in fact made, and no briefs filed with the Clerk of this court so far as known to the writer.

As set forth in the affidavit in support of this motion, effort was made, by telephone to induce counsel to prepare and serve his brief herein, and thereafter, upon receipt of telegraphic advice from the Clerk of this court the motion and affidavit filed here in were left at the office of counsel for plaintiffs in error.

This motion is not urged upon the court with any

thought that technical advantage should, or would, in any case, be taken of defendant's right of review of a criminal case. But the attitude of the plaintiff seeking appellate relief should at least not obstruct a speedy and orderly presentation of the matter. Under the conditions outlined herein such a result becomes all but impossible.

The cases brought here are, as to each, in the same situation, and should, it is urged, to the court be dismissed.

STATEMENT OF CASE

If the court should be of the opinion that the question raised by the writ should be reviewed here, counsel for the defendant in error must confess himself somewhat at a loss as to the scope of the inquiry. As orally stated by counsel for plaintiff in error, it was the intention to present the single question:

“May the defendant in a criminal case who has entered in open court his plea of guilty, *as a matter of right*, change that plea to not guilty”
Plaintiffs in error contend that he may do so.
The defendant in error contends that the ques-

tion is one for the discretion of the court under all the circumstances of the particular case. That in the absence of any showing of an abuse of judicial discretion, the judgment should be sustained. The three cases present identical questions on this point.

The history of case 3,500, as shown by the transcript follows:

Cause No. 3,500—Criminal indictment charging violation of Act of February 4, 1887, as amended, returned December 22, 1916. (Tr. p. 45) Plea of guilty entered by defendant, Logan Billingsley, December 28, 1916, accompanied by counsel, George F. Vanderveer. Plea as to count II and judgment postponed. Tr. p. 45.)

Sentence of Logan Billingsley to thirteen months at the United States Penitentiary at McNeil Island on April 19, 1917, to run concurrently with causes No. 3492 and No. 3557. (Tr. p. 47.)

Petition for writ of error filed and writ allowed May 10, 1917. (Tr. p. 51).

In the Transcript of Record as printed (No. 3,500) Fred Billingsley is not shown as joining in the petition for the writ but his situation is identical with that of Logan Billingsley with respect to the question raised.

No affidavit was offered to the District Court and none appears in the transcript setting forth any facts upon which application was based for change of plea.

ARGUMENT.

It is a legal axiom that every presumption of law rises in support of a judgment once entered. The jurisdiction of the parties, the contentions of the pleaders and the disturbing contradictions of evidence are fused into a final result which is described by the legal term, "judgment." In a criminal cause a defendant has certain legal privileges and rights but he remains, still, in legal parlance, a pleader. If he sees fit, under circumstances which by their very solemnity invite deliberation, to admit his guilt and waive the proof of it, he should be and is, by every moral and legal principal, bound by his act. The only concern which courts might feel is that the plea should not be entered under circumstances which might be indicative of fraud or deceit. But of the conditions surrounding the defendant, the trial court is, and must remain, the judge, unless those circumstances are by proper affidavits or evidence

otherwise produced and laid before the appellate court. As suggested before, there is nothing here to give the appellate court any information suggesting the slightest irreguearity in the judgment as entered. The bareness of the record speaks for itself. The court after listening for three full days to these defendants recital on oath of their part in the long series of misdemeanors and crimes described in these indictments was undoubtedly convinced of the defendants' clearness of thought and decision of mind. The defendants had answered that they were guilty to the charge in the indictment and thereafter on oath recited facts which abundantly proved their guilt.

The writer in "Cyc" Vol. 12, p. 353, says:

"It is wholly in the discretion of the court whether a plea of any sort may be withdrawn. Permission may always be granted, but unless an abuse of discretion is shown the refusal of permission to withdraw a plea is not error.

"A plea of guilty is a confession of guilt, and is equivalent to conviction. The court must pronounce judgment and sentence as upon a verdict of guilty."

A case closely in point is that of *Curran vs. State*, 99 Pac. 420, 53 Ore. 154, in which there was a

plea of guilty to an unlawful sale of liquors. An attempt was made to withdraw the plea. The court points out that no attempt was made by affidavit or otherwise to support the application.

The court says:

“The absolute right of the party, after pleading guilty to criminal charge to withdraw such admission and to interpose a plea of not guilty, is generally denied; the rule being that determination of the question rests in the judicial discretion *of the court.*”

The Supreme Court of the state of Washington, in the case of *State v. Cimini*. 101 Pac. 891, 53 Wash., 268, takes the same view although it is contended that Cimini had entered his plea on a promise of immunity.

In the Virginia case of *Early v. Commonwealth*, 11 S. E. 795, in which defendant was charged with murder, it was held not error to refuse the defendant permission to withdraw a plea of guilty and enter a plea of abatement.

The attention of the court is particularly called to the case of *State v. Shanley* (West Virginia) 183 S. E. 734, where the question is discussed through several pages and many cases are reviewed.

The Court says in part:

“It would be taking a long step toward unsettling proceedings in such cases if the defendant is encouraged to go broadcast in search of loose verbal agreements with which to nullify and set aside confessions of guilt made in open court, and entered without qualification on the record.

“The case for relief must be very strong and urgent, and clearly and certainly made out before this court on the grounds of public policy, if on no other, ought to interfere.”

Other state cases are found in *Barton v. State*, 23 Wis. 587, 72 Ala. 164; 64 Cal 401; reported in 1 Pac. 490.

In the following Federal cases similar questions have been decided along parallel lines.

In the *United States v. Bayard*, 16 Fed. 382, it is said:

“After such plea the only objection open to them on this score is that the indictment fails to describe the various acts intended to be proved with that reasonable certainty which the law required to constitute a valid indictment.”

In *Andrews v. United States*, 224 Fed. 418, it was held that action of court in refusing to permit the withdrawal of a plea of not guilty for the purpose of interposing a demurrer is a matter of discretion.

In the case of *United States v. Lewis*, 192 Fed. 637, a plea of not guilty was entered. Permission to withdraw the plea and file a motion to quash was held a matter of discretion.

Judge Campbell held in the case of *United States v. London*, 176 Fed 977, that the refusal to permit a plea of guilty to be withdrawn to interpose a motion to quash was a matter of discretion with the trial court.

This appellate court in the recent case of *Andrews v. U. S.* 224 Fed. 418, held that the action of the court in refusing to permit a plea of *not* guilty to be withdrawn for the purpose of interposing a demurrer was not error, that it was a matter of discretion with the court.

In the three cases brought here for review there is no suggestion of abuse of discretion and cannot with truth be urged by counsel. The District court knew the circumstances and was entirely familiar with the facts. He acted well within his discretion in his conclusion. The action of the trial court should be sustained.

Respectfully submitted,
CLAY ALLEN,
Attorney for Defendant in Error.

No. 3022
No. 3023
No. 3024

United States Circuit Court of Appeals For the Ninth Circuit

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UPON WRIT OF ERROR TO THE UNITED
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DIVISION.

Supplemental Brief of Defendant in Error

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Supplemental Brief of Defendant in Error

Leave of court being first had and obtained, the
defendant in error submits the following supple-
mental brief:

Counsel for plaintiffs in error have served upon

this office under date of October 4, 1917, their brief in support of their Writ of Error.

The brief thus submitted is given over in the most part to a discussion of the question as to the right of a defendant to change his plea. This question is discussed in the original brief filed on behalf of the government. Contrary, however, to the suggestion of counsel for the plaintiffs in error as made to government's counsel, there has been an attempt made on page 13 of the brief to raise a question as to the sufficiency of one of the indictments charged against these several defendants.

This makes it necessary to call the attention of the court to the fact that there are three different cases pending against these two defendants in the United States District Court for the Western District of Washington.

In Cause No. 3492 in the lower court, here No. 3022, defendants were charged in a single count with a conspiracy to violate Section 238 of the Penal Code. Both of the defendants, Logan Billingsley and Fred Billingsley, pleaded guilty to this count.

In Cause No. 3500 in the lower court, here No.

3023, these two defendants, together with other persons, were charged in two counts with conspiracy to violate Act of Congress approved February 4, 1887, entitled, "An Act to Regulate Commerce," and amendments thereto. The defendant, Logan Billingsley, pleaded guilty to Count I of this indictment.

In Cause No. 3551 in the lower court, here Cause No. 3024, the record of which has not been printed, in three counts, the first of which charges a conspiracy on the part of numerous defendants, including the defendants, Logan Billingsley and Fred Billingsley, with conspiring to violate Section 238 of the Penal Code of the United States. In Count II the same defendants were charged with conspiring to violate the Act of Congress of February 4, 1887, as amended, while Count III charged the same defendants in another form conspiring to violate Section 238 of the Penal Code. The two defendants, Logan Billingsley and Fred Billingsley, each pleaded guilty to each of the three counts in this indictment.

Of the cases referred to, Causes No. 3022

(Lower Court No. 3492) and No. 3023 (Lower Court No. 3500), the transcript has been printed, while in Cause No. 3024 (Lower Court No. 3551), the transcript has not been printed.

It should be noted that the argument of counsel on page 13 has reference to those counts in which is charged a violation of Section 238, and is not applicable to the other counts of the indictment directed at the Inter-State Commerce Act. It appears to be the contention of counsel in so far as the record concerns Section 238, that under that section it is not permissible to include in a charge under Section 37 persons other than those "officers, agents or employees referred to in Section 238." While counsel cites no authority in support of this contention, it is suggested to the court that this is not a new contention, but is one that on different occasions has been presented to various courts.

In support of the contention of counsel for the government that a person who does not belong to a particular class of persons may conspire with others within that class to commit an offense which he could not himself commit, the following authorities

are cited:

Queen v. Whitechurch, L. R. 24 Q. B. D. 420.

U. S. v. Boyer, 4 Dill. 407, Fed. Cases 14547.

Rex v. Potts, R. & R. 353.

State v. Sprague, 4 R. I. 260.

U. S. v. Snyder, 14 Fed. 554.

U. S. v. Stevens, 49 Fed. 736.

In addition to these earlier authorities, there are many recent ones in the federal courts. See:

Steigman, 220 Fed. 65.

U. S. v. Cohn, 142 Fed. 983.

The attention of the court is respectfully directed to the *Steigman* case, in which Lewis and David Steigman were charged with unlawfully conspiring together that Lewis Steigman should commit an act of bankruptcy and thereafter be adjudged a bankrupt, and as such bankrupt should knowingly and fraudulently conceal his property from the trustee. This was an act of course made punishable under the bankruptcy law, and the offense made punishable by bankruptcy law is of course the concealment by a bankrupt of goods

from his trustee. The court holds that the two men could be charged with conspiring to commit the offense, which could be committed by Lewis Steigman alone.

Respectfully submitted,

CLAY ALLEN,

Attorney for Defendant in Error.

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